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UNITED STATES COPYRIGHT ROYALTY JUDGES

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IN THE MATTER OF: )

)

DETERMINATION OF RATES ) Docket No.

AND TERMS FOR MAKING AND ) 16-CRB-0003-PR

DISTRIBUTING PHONORECORDS ) (2018-2022)

(PHONORECORDS III), )

-----X

OPEN SESSION

Pages: 3611 through 3909 (with excerpts)

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8 DISTRIBUTING PHONORECORDS) (2018-2022)

9 (PHONORECORDS III), )

10 -----X

11 BEFORE: THE HONORABLE SUZANNE BARNETT

12 THE HONORABLE JESSE M. FEDER

13 THE HONORABLE DAVID R. STRICKLER

14 Copyright Royalty Judges

15

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21 March 29, 2017

22 9:15 a.m.

23 VOLUME XIII

24 Reported by:

25 Karen Brynteson, RMR, CRR, FAPR

## 1 A P P E A R A N C E S:

2 Counsel for National Music Publishers Association,  
3 Nashville Songwriters Association International:

4 DAVID ZAKARIN, ESQ.

5 BENJAMIN K. SEMEL, ESQ.

6 FRANK SCIBILIA, ESQ.

7 LISA M. BUCKLEY, ESQ.

8 JAMES A. JANOWITZ, ESQ.

9 JOSH WEIGENSBERG, ESQ.

10 MARION HARRIS, ESQ.

11 WILLIAM L. CHARRON, ESQ.

12 KAVERI B. ARORA, ESQ.

13 Pryor Cashman, LLP

14 Seven Times Square

15 New York, New York 10036

16 212-421-4100

17 Counsel for Apple Music, Inc.:

18 DALE CENDALI, ESQ.

19 CLAUDIA RAY, ESQ.

20 MARY MAZZELLO, ESQ.

21 PHILLIP A.L. HILL, ESQ.

22 JOHANNA SCHMITT, ESQ.

23 Kirkland & Ellis, LLP

24 601 Lexington Avenue

25 New York, New York 10022

## 1 APPEARANCES (Continued):

2 Counsel for Pandora Media, Inc.:

3 PETER D. ISAKOFF, ESQ.

4 Weil Gotshal &amp; Manges, LLP

5 1900 Eye Street, N.W.

6 Suite 900

7 Washington, D.C. 20005

8 202-882-7155

9

10 BENJAMIN E. MARKS, ESQ.

11 JENNIFER RAMOS, ESQ.

12 JACOB B. EBIN, ESQ.

13 Weil, Gotshal &amp; Manges, LLP

14 767 Fifth Avenue

15 New York, New York 10153-0119

16 212-310-8029

17

18 DAVID SINGH, ESQ.

19 HONG-AN TRAN, ESQ.

20 Weil, Gotshal &amp; Manges LLP

21 201 Redwood Shores Parkway

22 Redwood Shores, CA 94065

23 650-802-3000

24

25

## 1 APPEARANCES (Continued):

2 Counsel for Spotify USA, Inc.:

3 A. JOHN P. MANCINI, ESQ.

4 Mayer Brown LLP

5 1221 Avenue of the Americas

6 New York, New York 10020

7 212-506-2295

8

9 RICHARD M. ASSMUS, ESQ.

10 KRISTINE M. YOUNG, ESQ.

11 Mayer Brown LLP

12 71 S. Wacker Drive

13 Chicago, Illinois 60606

14 312-782-0600

15

16 PETER O. SCHMIDT, ESQ.

17 ANITA Y. LAM, ESQ.

18 Mayer Brown LLP

19 1999 K Street, N.W.

20 Washington, D.C. 20006

21 202-263-3000

22

23

24

25

## 1 APPEARANCES (Continued):

## 2 Counsel for Amazon Prime Music:

3 MICHAEL S. ELKIN, ESQ.

4 THOMAS PATRICK LANE, ESQ.

5 DANIEL N. GUISBOND, ESQ.

6 STACEY FOLTZ STARK, ESQ.

7 SCOTT M. AHMAD, ESQ.

8 Winston &amp; Strawn, LLP

9 200 Park Avenue

10 New York, New York 10166

11 212-294-6700

12

## 13 Counsel for Google, Inc.:

14 KENNETH STEINTHAL, ESQ.

15 JOSEPH WETZEL, ESQ.

16 DAVID P. MATTERN, ESQ.

17 KATHERINE E. MERK, ESQ.

18 JASON BLAKE CUNNINGHAM, ESQ.

19 King &amp; Spalding, LLP

20 101 Second Street, Suite 2300

21 San Francisco, CA 94105

22 415-318-1211

23

24

25

1 P R O C E E D I N G S

2 (9:15 a.m.)

3 JUDGE BARNETT: Good morning. Please be  
4 seated. Mr. Zakarin, we're continuing with Mr.  
5 Israelite this morning?

6 MR. ZAKARIN: We are. Thank you, Your  
7 Honor.

8 JUDGE BARNETT: You remain under oath,  
9 Mr. Israelite.  
10 Whereupon--

11 DAVID ISRAELITE,  
12 a witness, called for examination, having previously  
13 been duly sworn, was examined and testified further  
14 as follows:

15 DIRECT EXAMINATION -- RESUMED

16 BY MR. ZAKARIN:

17 Q. Doing this like a serial, where we left  
18 off yesterday was the 2008 and 2012 settlements.

19 JUDGE STRICKLER: Are we restricted or  
20 unrestricted?

21 MR. ZAKARIN: It's unrestricted at this  
22 point.

23 JUDGE BARNETT: I'm sorry. Ms. Whittle,  
24 we -- or, counsel, we've been handed up the promised  
25 excerpts of Exhibit 3040, and since this is

1 essentially different from what was originally  
2 marked as 3040, I think what we'll do is assign it a  
3 new number.

4 JUDGE STRICKLER: How about 3040-A, can  
5 we do that, because it's -- it's within it, right?  
6 Can you put a little A next to it? 3040-A?

7 THE CLERK: It will be Trial Exhibit  
8 6012.

9 (Copyright Owners Exhibit 6012 was marked  
10 for identification.)

11 JUDGE BARNETT: 6012 for the record and  
12 for your records. Thank you.

13 MR. ISAKOFF: Can I ask if we've seen  
14 that -- that's the excerpt from Herring's deposition  
15 that was marked during Barry's testimony? Is that  
16 what that is?

17 JUDGE FEDER: Yes.

18 JUDGE BARNETT: Yes.

19 JUDGE FEDER: This is the excerpt from  
20 Herring's deposition.

21 MR. ISAKOFF: Have we seen what you've  
22 just handed up?

23 MR. HARRIS: I mean, I believe you've  
24 seen the deposition. I testified to the pages that  
25 were going in, and I'll represent to you that those



1 are the pages that are there.

2 JUDGE BARNETT: You will need to make  
3 copies for counsel, please.

4 MR. ISAKOFF: Normally, I would just  
5 expect to see it. Thank you.

6 JUDGE BARNETT: So by the next break, be  
7 sure everyone else gets it.

8 Now, back to you, Mr. Zakarin.

9 MR. ZAKARIN: All right. Okay.

10 BY MR. ZAKARIN:

11 Q. Mr. Israelite, were you personally  
12 involved in the 2008 and 2012 settlement  
13 discussions?

14 A. Yes, I was.

15 Q. Now, and I may have this slightly wrong,  
16 but the 2008 settlement set the rates and terms  
17 prospectively for the five-year period through, I  
18 guess, 2012; is that -- is that approximately  
19 correct?

20 A. Yes, I believe what we call Phono I  
21 started later than would normally be the schedule  
22 for the five-year block, and so we ended up  
23 approximately a little more than a year behind what  
24 the normal schedule would be.

25 Q. And did the settlement also set

1 mechanical rates for limited downloads or  
2 interactive streaming for the period preceding 2008,  
3 from 2001 to 2008?

4           A.    Yes.  There was a long period of time  
5 from really the inception of these business models  
6 until this settlement where many companies had  
7 operated under a rateless agreement, where the  
8 agreement was that when the CRB set the rate  
9 prospectively, that rate would be applied  
10 retroactively from inception of when those Services  
11 began business.  And that was -- that was an  
12 agreement that -- before my time, that the NMPA  
13 entered into with several parties.

14                   JUDGE STRICKLER:  Were the retroactive  
15 payments, in fact, made?

16                   THE WITNESS:  There were two different  
17 categories.  The first was with the RIAA  
18 representing record labels.  And with that  
19 agreement, the RIAA made a advance, a lump-sum  
20 advance amount, and they never recouped against that  
21 amount.  And so those were paid in full.

22                   For the other Services that we would call  
23 the Digital Services that also entered into similar  
24 agreements, I don't believe that they ended up  
25 paying, and I don't believe that we ended up going

1 after them because I think it was such a small  
2 amount of money that we didn't think that it  
3 mattered.

4 JUDGE STRICKLER: So was it -- it was a  
5 small amount of money between 2001 and 2008?

6 THE WITNESS: For -- yes. Or --

7 JUDGE STRICKLER: For the streaming  
8 services?

9 THE WITNESS: Yes, or in some cases, I  
10 believe, there -- there was no money. I believe the  
11 companies took the license but then never actually  
12 used it or generated any revenue.

13 JUDGE STRICKLER: Okay, thank you.

14 BY MR. ZAKARIN:

15 Q. So if I understand correctly, other than  
16 the advances that you've talked about that came  
17 through the RIAA, were any other -- were any  
18 interactive streaming or limited download services,  
19 to the best of your knowledge, paying mechanical  
20 royalties prior to the 2008 settlement?

21 A. No. I don't believe so. I believe  
22 anyone who was operating prior to that settlement  
23 was operating under one of these rateless agreements  
24 with an agreement to apply the rate retroactively.

25 Q. Okay. So if any of the Services failed

1 or ceased to exist prior to 2008, I take it it was  
2 not because of the overwhelming burden of paying  
3 mechanical royalties?

4 A. They would have paid no royalties. So  
5 any service that operated between 2001 and the time  
6 of the settlement, which became effective, I  
7 believe, in 2009, if any company began and stopped,  
8 they had not paid any mechanical royalties, other  
9 than the RIAA, which had made this initial deposit  
10 but ended up not getting into that business, really.

11 Q. Okay. Ms. Levine of Google has testified  
12 here that she was involved in settlement discussions  
13 with respect to 2008 and/or 2012. Do you recall  
14 whether Ms. Levine was involved in any of the  
15 negotiations in which you participated?

16 A. I don't believe she was. My recollection  
17 is the only interaction I had with -- with  
18 Ms. Levine was in her capacity working for YouTube  
19 when we were involved in a litigation against  
20 YouTube, but I do not recall her having any role in  
21 the CRB.

22 Q. And Mr. Parness of Pandora also  
23 testified -- I believe it was about the 2008  
24 settlement and his claimed involvement in some  
25 discussions.

1                   Do you recall any negotiations in which  
2 Mr. Parness was a direct participant?

3           A.   No, I do not. I do not recall  
4 interacting with him at all during that settlement  
5 discussion.

6           Q.   I take it -- do you have any knowledge  
7 one way or the other as to whether perhaps behind  
8 the scenes they were working with DiMA?

9           A.   I wouldn't know what -- what DiMA did  
10 with their own members behind the scenes, but we  
11 dealt primarily with the DiMA personnel. And I do  
12 recall some involvement of some of the company  
13 people, but not with -- with Mr. Parness or  
14 Ms. Levine.

15                   JUDGE STRICKLER: Did -- di the  
16 representatives of DiMA tell you during the  
17 negotiations that, whatever was discussed for  
18 purposes of potential approval in the settlement,  
19 they had to take back to their members before they  
20 could go -- go ahead and either agree or disagree  
21 with the proposal?

22                   THE WITNESS: That was assumed, as it was  
23 on my side as well with regard to my Board and my  
24 membership as well, although my recollection is that  
25 in the first settlement in 2008, the -- the CEO of

1 DiMA had quite a bit of influence with his members  
2 and spoke for them very strongly. And so there  
3 wasn't a sense that he wasn't empowered to  
4 negotiate. The sense was that he was very empowered  
5 to negotiate. And I don't recall him having to ever  
6 back-track on anything that he committed to during a  
7 negotiation.

8 JUDGE FEDER: Who was that, for the  
9 record?

10 THE WITNESS: John Potter was his name.

11 JUDGE STRICKLER: Just -- just so I'm  
12 clear, you -- you understood him to be empowered to  
13 negotiate, but you did also understand that he was  
14 empowered to get assent from his -- from his  
15 constituency before he could come back and -- and  
16 agree to particular terms?

17 THE WITNESS: Yes, Judge. I think that  
18 that was assumed on both side, that both of us would  
19 need final approval from our boards before we could  
20 -- could sign documents.

21 JUDGE STRICKLER: Thank you.

22 BY MR. ZAKARIN:

23 Q. I ask you to turn to Exhibit 3030, which  
24 is your rebuttal statement. And turn to paragraph  
25 17, if you would.

1                   And in paragraph 17 in the first  
2 sentence, you refer to a Mr. Quirk who testified in  
3 Phonorecords I, and your footnote references an  
4 exhibit. Do you see that?

5           A.    I do.

6           Q.    The footnote is footnote 15. Do you  
7 recall Mr. Quirk, his testimony in Phono I?

8           A.    I don't have a specific memory of his  
9 entire testimony, but I -- I do recall reading his  
10 witness statement. And I have a general  
11 recollection of him being involved in that first  
12 proceeding, yes.

13                   JUDGE STRICKLER: Counsel, just a  
14 question for you.

15           MR. ZAKARIN: Sure.

16                   JUDGE STRICKLER: So the footnote is to  
17 Mr. Quirk's written direct statement --

18           MR. ZAKARIN: Yes.

19                   JUDGE STRICKLER: -- in Phonorecords I.  
20 Has that been designated as prior testimony in this  
21 proceeding?

22           MR. ZAKARIN: It was referenced and we  
23 have it to offer it into evidence since it was a  
24 document that was referenced specifically in  
25 Mr. Israelite's testimony.

1 JUDGE STRICKLER: This I understand. I'm  
2 just asking the question as to whether it was  
3 designated.

4 MR. ZAKARIN: Hasn't -- has not been  
5 designated as prior testimony for that purpose, but  
6 it was identified in effect as an exhibit to his  
7 witness statement in that footnote.

8 JUDGE STRICKLER: Thank you.  
9 BY MR. ZAKARIN:

10 Q. I ask you to look in your book for  
11 Exhibit 321. And I believe that -- I believe 321  
12 corresponds to the document referenced in footnote  
13 15. Can you identify Exhibit 321?

14 A. Yes. This appears to be the testimony of  
15 Mr. Quirk.

16 Q. Do you recall reading Mr. Quirk's written  
17 direct statement when it was submitted? I think it  
18 was probably submitted in redacted form as this one  
19 is, in -- I guess it was 2007 when it was submitted?

20 A. I honestly don't have a recollection of  
21 -- of reading this ten years ago, but I would have  
22 read it. I read all of the written submissions at  
23 that time. And so I would have read it at the time,  
24 but I don't have a specific recollection of -- of  
25 reading this testimony.



1 Q. Do you recall reading it in connection  
2 with the submission of your rebuttal testimony?

3 A. Yes, I do recall reading it for that  
4 purpose.

5 Q. Okay.

6 MR. ZAKARIN: I'm going to offer  
7 Exhibit 321.

8 MR. MARKS: We object. This is a  
9 back-door attempt to designate the testimony, and it  
10 wasn't -- it hasn't been properly designated in his  
11 testimony.

12 MR. STEINTHAL: We join in that.

13 MR. ZAKARIN: This was referenced  
14 specifically and identified specifically in his  
15 written statement. There is no surprise. There's  
16 no prejudice. It was -- it was known to them.

17 JUDGE BARNETT: What's the purpose of  
18 having it admitted?

19 MR. ZAKARIN: There's two purposes, Your  
20 Honor. And there's going to be another document as  
21 well, which is the testimony of Mr. Sheeran. It's  
22 being offered because there are statements -- a  
23 couple of statements in Mr. Quirk's testimony which  
24 -- which confirm testimony of the witness respecting  
25 the nature of the industry at the time.

1           With respect to Mr. Sheeran's statement,  
2   which I'll get to in a second, it identifies at  
3   least one of the proposals that were made by the  
4   NMPA back in -- I guess it was probably in 2007 or  
5   2008 in the rate proceeding, and, in addition, it  
6   identifies what was being advanced by DiMA at the  
7   time.

8           And both of those statements are  
9   identified in the footnote -- or the footnotes to  
10  Mr. Israelite's testimony. Again, no surprise.

11           JUDGE BARNETT: Okay. We're going to be  
12  quiet for a minute. You don't need to keep talking  
13  to fill the space. Thank you.

14           MR. ZAKARIN: That's okay.

15           JUDGE STRICKLER: Counsel, while we're  
16  waiting, did you designate any other testimony,  
17  prior testimony?

18           MR. ZAKARIN: No.

19           JUDGE STRICKLER: In this proceeding at  
20  all?

21           MR. ZAKARIN: I don't believe so.

22           JUDGE STRICKLER: Thank you.

23           JUDGE BARNETT: Let's confer. Excuse us  
24  for a moment.

25           (Judges confer.)

1 JUDGE BARNETT: Please be seated.

2 MR. ZAKARIN: Your Honor, if I can,  
3 there's two facts that I want to give you in advance  
4 of your ruling. One is that it was attached as part  
5 of our exhibits. Number 2 is that it's designated  
6 as an Amazon exhibit and it's not objected to.

7 JUDGE BARNETT: Mr. Marks?

8 MR. MARKS: Yeah, I just wanted to  
9 address that. It just doesn't comply -- their  
10 attempt to introduce this doesn't comply with  
11 section 351.4(b)(2), which requires that if they're  
12 going to rely on the testimony of a witness in a  
13 prior proceeding, the complete testimony, including  
14 written, direct, et cetera, none of that has been  
15 offered to us, so we don't think it's appropriate  
16 here.

17 JUDGE BARNETT: Mr. Elkin, did your  
18 client designate this as an exhibit or as prior  
19 testimony or did you simply have it marked as an  
20 exhibit?

21 MR. ELKIN: It was marked as an exhibit.

22 JUDGE BARNETT: All right. The rule that  
23 you have cited, Mr. Marks, is correct. This clearly  
24 was not designated as prior testimony. We can look  
25 at it. We can take official notice. It's in our

1 records.

2 But whether we admit it in this case  
3 depends on our analysis of the hearsay exception and  
4 our rules, not the real rule. So if we deem it  
5 appropriate, notwithstanding its hearsay nature, we  
6 can admit it.

7 So, Mr. Zakarin, why would it be  
8 appropriate for us to admit it?

9 MR. ZAKARIN: Because, Your Honor, it --  
10 there are statements -- and I could do it even  
11 refreshing the witness' recollection, to the extent  
12 it's necessary -- but there are statements in it  
13 which reflect an admission, if you will, by a  
14 participant, which was DiMA at the time, which was a  
15 participant here. And we've heard that the parties  
16 here were and are members of DiMA.

17 As to the state -- at least dealing with  
18 this particular exhibit -- as to the state of the  
19 industry at the time, there's two statements which  
20 we think are admissions and they're confirmatory as  
21 well of what we have said.

22 As to Mr. Sheeran -- we might as well  
23 deal with both statements now, rather than doing  
24 them piecemeal. As to Mr. Sheeran's statement, it  
25 says two things, and it comes in on the same basis,

1 which is, one, it does identify the proposal or  
2 proposals of the NMPA, which the witness can  
3 identify as well, and it also includes a proposal  
4 that sort of forms the underpinning, if you will, of  
5 the negotiations that led to the 2008 settlement.

6 And there's also a statement relative,  
7 again, to the nature or the status of the industry  
8 at the time, which we think constitutes an  
9 admission. Your Honors have heard testimony how the  
10 industry was -- everybody knew what it was, what it  
11 was going to be, et cetera. That's not the state of  
12 what those admissions are. They're not our  
13 statements; they are DiMA's statements.

14 JUDGE BARNETT: Okay.

15 MR. ZAKARIN: So for those two purposes,  
16 Your Honor.

17 JUDGE BARNETT: Okay. In order for us to  
18 get the full picture of the circumstances at that  
19 time, we think it is appropriate to admit this, but  
20 it has to be admitted or submitted in the way in  
21 which the rule requires, and that is if you want it  
22 -- as if it were designated. If you want to  
23 designate it, you have to -- and this is -- the rule  
24 is confusing here. It talks about designating prior  
25 testimony, and then further down in that section, it

1 says "the complete testimony, including direct,  
2 cross, and redirect," which implies transcript.

3               So rather than submit that to us, we  
4 would like you to share that with your opposing  
5 counsel, and opposing counsel can then have an  
6 opportunity to respond to cross-designate. And if  
7 there's something in there that makes you believe  
8 there was a different witness that might have  
9 contradicted this -- do you see where we're going?  
10 It's going to be kind of a -- a mini-trial on the  
11 papers with regard to these two witnesses that were  
12 not properly designated to begin with.

13               MR. MARKS: Thank you, Your Honor.

14               JUDGE BARNETT: Thank you. So for  
15 purposes of today, you may proceed with the  
16 examination. And then we will consider what we  
17 receive back from the Services.

18               MR. ZAKARIN: It will be -- it will be  
19 very quick, as I said, Your Honor. It's just for  
20 limited purposes only.

21 BY MR. ZAKARIN:

22               Q. Turn to Exhibit 321 and look at paragraph  
23 6, if you would. And the first sentence in  
24 paragraph 6 states -- and this is in Mr. Quirk's  
25 statement -- "The market for digital music

1 subscription services is still new and constantly  
2 evolving."

3 Does that conform to what your  
4 understanding was of the industry at the time?

5 A. Yes.

6 Q. And I ask you to turn to paragraph 48.  
7 And in paragraph 48, the second sentence reads,  
8 "These investments" -- and it's referring back to  
9 the investments that RealNetworks had made in  
10 developing the technology, et cetera. "These  
11 investments are very risky, as subscription music  
12 services represent a new and unproven business  
13 model."

14 Again, does that conform -- conform to  
15 your understanding and knowledge of the industry at  
16 the time?

17 A. Yes.

18 Q. In paragraph 18 in footnote 16 of your  
19 written rebuttal statement, you refer to, and indeed  
20 you attached, the rebuttal statement of Dan Sheeran.  
21 I ask you to pull Exhibit 322 and ask if you can  
22 identify Exhibit 322?

23 A. Yes, this is the written rebuttal  
24 testimony of Dan Sheeran.

25 Q. And that was attached, I believe, as

1 Exhibit 168 to the rebuttal testimony that you  
2 submitted?

3 A. Yes.

4 Q. Did you -- do you recall reading  
5 Mr. Sheeran's rebuttal statement at or about the  
6 time it was submitted?

7 A. My answer is the same. I do not have a  
8 specific recollection of reading this ten years ago,  
9 but I would have read all of the written testimony,  
10 and I did review it for the purpose of my rebuttal  
11 statement.

12 Q. Okay. Turn to paragraph 13, if you  
13 would, of Mr. Sheeran's statement. And he describes  
14 here the Copyright Owners' proposal in the 2006  
15 proceeding, which I think got done in 2008, and he  
16 describes the proposal for limited downloads. The  
17 Copyright Owners' proposal.

18 Do you recall -- looking at it in front  
19 of you, do you recall whether or not his description  
20 of the proposal conforms to what the proposal was?

21 A. Yes, I believe this is just restating  
22 what our direct case proposal was.

23 Q. Okay. And for limited downloads, does it  
24 accurately reflect that it was a three-tier  
25 proposal?



1           A.    Yes.

2           Q.    And the greater of three tiers?

3           A.    The greatest of the three, correct.

4           Q.    Okay. And the three tiers were, first,

5 a percent of revenue, which was 15 percent. The

6 second was one-third of -- we'll call it TCC, and

7 the third was a -- a penny rate. Is that right?

8           A.    A per-stream rate, yes.

9           Q.    A per-stream. Well, it --

10          A.    For -- a penny rate --

11          Q.    This was a -- this was for limited

12 downloads, so it would be a per --

13          A.    It was a per-use rate, correct.

14          Q.    Yes. Was there a similar proposal that

15 the Copyright Owners put forth for interactive

16 streaming?

17          A.    Yes, there was.

18          Q.    Do you recall what it was?

19          A.    I don't recall the specific numbers. I

20 believe they were slightly lower numbers, but they

21 were the same structure as our proposal for limited

22 downloads.

23          Q.    The same three-tier structure?

24          A.    Yes, the same greatest of three different

25 tiers.

1           Q.    Turn to paragraph 28, if you would.  And  
2  it says here, referring back, "Second, as noted  
3  above, DiMA has included proposed minima.  The point  
4  of the minima is to provide some protection for  
5  Copyright Owners without imposing unreasonable costs  
6  on digital music services or preventing services  
7  from expanding or entering into the marketplace.  
8  The proposed minima also recognize that business  
9  models are evolving and that both subscription and  
10 non-subscription offerings may develop more over the  
11 next five years."

12                   Do you recall DiMA proposing a minima of  
13 some sort to protect the Copyright Owners?

14           A.    I recall there being a minima in their  
15 proposal.  I -- I don't recall what the specific  
16 proposal was.

17           Q.    Now, the ultimate Subpart B that was  
18 embodied in the 2008 settlement ended up  
19 incorporating a tiered or a greater of structure,  
20 did it not?

21           A.    Yes, it did.

22           Q.    And it also included minima or floors; is  
23 that right?

24           A.    Yes, it did.

25           Q.    Okay.  Do you recall from the

1 negotiations how the precise percentages, numbers,  
2 and various floors and minima were determined or how  
3 they came about?

4           A. My recollection is that the structure  
5 that we proposed in our direct case became very much  
6 the framework of the structure of the settlement.  
7 We ended up with a -- five different categories of  
8 what we called the Subpart B, and each of them had a  
9 greater of formula, each of them slightly different.

10           And the specific numbers that were  
11 included in the settlement, my recollection is that  
12 it was a process involving back and forth with some  
13 sense of both sides being able to agree on the  
14 specific numbers, but it wasn't -- I don't recall  
15 there being any formula to get to those numbers.

16           Q. Do you recall how the minima that was  
17 included or the various minima that were included  
18 came about? Do you have any recollection of the  
19 specifics of that?

20           A. Yes. It was a subject of quite a bit of  
21 -- of negotiation over how to structure it, but what  
22 we ended up with was similar to our proposal, a  
23 three-tiered system with us having the advantage of  
24 having the greater of three different tests. One of  
25 those tests was a percent of revenue. One of those

1 tests involved some total amount or some percentage  
2 of what the record labels were paid. And then for  
3 some of the categories, a third test was a  
4 mechanical-only total amount. And that we then  
5 would get the benefit of whichever of the three  
6 tests provided the highest number.

7 Q. Do you recall any -- during the  
8 discussion -- do you recall any discussion during  
9 negotiations about the possibility that one or  
10 another of the minima might bind?

11 A. Well, I -- I don't even think we thought  
12 of them as minima. We thought of them as alternate  
13 rates. And we would get the greatest of three  
14 different rates.

15 And we had no idea, of course, because  
16 there was such little activity in the space that we  
17 didn't have a lot of empirical evidence to test it  
18 against. So I think our belief was that any of  
19 those might have kicked in.

20 Some of the factors were beyond our  
21 control, such as pricing models, which we had  
22 nothing to say about, such as how much the  
23 performance payment would be, which we had nothing  
24 to say about.

25 And so our assumption was that any of the

1 three might kick in, depending on how the business  
2 developed.

3 Q. Now the Services, other than Apple, have  
4 argued here that the 2008 and/or 2012 settlements  
5 are appropriate benchmarks for setting rates in this  
6 proceeding.

7 Let me -- let me ask you, during the 2008  
8 negotiations, the actual negotiations, do you recall  
9 whether there was any discussion about the 801(b)  
10 factors in terms of your negotiations?

11 MR. STEINTHAL: I'm going to object to  
12 the characterization of the Services' position. I  
13 have no problem with everything that comes after in  
14 the form of a question, but the characterization of  
15 the record, I think, the record speaks for itself.

16 JUDGE BARNETT: Sustained. Would you  
17 rephrase the question?

18 MR. ZAKARIN: I will rephrase the  
19 question.

20 JUDGE BARNETT: Thank you.

21 BY MR. ZAKARIN:

22 Q. Do you recall during the 2008 negotiation  
23 any discussion of the 801(b) factors playing a role  
24 in the settlement?

25 A. No, I don't recall those being discussed

1 as part of the settlement.

2 Q. Do you recall -- and we covered some of  
3 this yesterday -- do you recall any discussion about  
4 whether the settlement could be used as a future  
5 benchmark or precedent?

6 A. Yes. My recollection is that, in  
7 addition to the statutory language about new trial  
8 being de novo, we agreed in our settlement language  
9 a restriction that it would not be precedential.

10 JUDGE STRICKLER: When you say in your  
11 settlement language, you mean in your written signed  
12 settlement document?

13 THE WITNESS: Yes, Judge.

14 JUDGE STRICKLER: Do you know whether  
15 that's record evidence in this proceeding?

16 MR. ZAKARIN: It is not, Your Honor.  
17 When you raised the question yesterday, I did pull  
18 the 2008 -- what's known as a wraparound agreement  
19 or wrap agreement. And -- from 2008.

20 I don't have the 2012, which may have  
21 different language. But the 2008 does have  
22 language. I'm prepared -- I think Mr. Steinthal is  
23 aware of it -- I'm prepared to provide it to the  
24 Court, but we haven't designated it. And so I'm  
25 reluctant to hand it up at this point because it

1 wasn't designated, but I did pull it in response to  
2 your question yesterday.

3 JUDGE BARNETT: Mr. Isakoff?

4 MR. ISAKOFF: I think we would object on  
5 the best evidence rule.

6 JUDGE FEDER: Can you use your  
7 microphone, please?

8 MR. MARKS: We don't have one.

9 MR. ISAKOFF: I wish we had one, but I'll  
10 -- I'll just speak louder.

11 JUDGE FEDER: Project.

12 MR. ISAKOFF: I'll object on grounds that  
13 this violates the best evidence rule.

14 JUDGE STRICKLER: Well, beyond that, it's  
15 not -- it's not -- well, you're talking about the  
16 testimony, I suppose, is what you're objecting to?

17 MR. ISAKOFF: That's correct, Your Honor.  
18 He's testifying to the contents of a ten-year-old  
19 document that has not been designated as an exhibit  
20 from memory; specific terms and language that could  
21 be germane.

22 JUDGE STRICKLER: Did you want to respond  
23 to counsel's suggestion that he was going to try to  
24 introduce the document now?

25 MR. ISAKOFF: It's a brand-new suggestion

1 to us that exhibits will be designated at this point  
2 in the proceeding.

3 MR. ZAKARIN: Let me respond to that, if  
4 I can, and in two ways. Number 1, I'm trying to  
5 address Mr. Isakoff's concern about the best  
6 evidence rule, although I think it was an objection  
7 I raised earlier with respect to testimony and the  
8 evidence came in orally anyway.

9 The second point is there have been  
10 additional exhibits that have been designated during  
11 this trial continuously, so I don't actually think  
12 that this is completely out of left field. I'm  
13 offering it, essentially, to respond to a question  
14 that Judge Strickler raised yesterday. If the  
15 Services don't want me to put it in, although, you  
16 know, I'm sure that they have it, I know  
17 Mr. Steinthal, as I said, questioned Mr. Israelite  
18 about the existence of the agreement at his  
19 deposition.

20 JUDGE STRICKLER: Well, don't make me the  
21 beard for your argument because I'm asking whether  
22 this document exists and was in evidence. I wasn't  
23 saying -- merely because I asked the question  
24 doesn't mean that I'm therefore suggesting that the  
25 document either is in evidence or can be put in



1 evidence at this point in time. That's an issue to  
2 be determined.

3 MR. ZAKARIN: I'm not attributing it to  
4 you. I'm just -- you were my prompt, but it  
5 certainly doesn't place it on you. It places it on  
6 me.

7 JUDGE BARNETT: I think the exhibits that  
8 we've continued to designate during this hearing  
9 have been rebuttal or impeachment documents. But,  
10 at any rate, Mr. Isakoff, did you have -- do you  
11 want the last word?

12 MR. ISAKOFF: Well, I think that if we're  
13 going to go to this first settlement, we certainly  
14 need to see both documents at once and then we can  
15 make a judgment on the second settlement.

16 JUDGE BARNETT: Okay.

17 MR. ISAKOFF: And the language that  
18 counsel is referring to with respect to any  
19 precedential use.

20 JUDGE BARNETT: Thank you. Mr. Zakarin,  
21 if you and your crew can provide copies of both  
22 settlement agreements to opposing counsel, then you  
23 can -- we'll leave open your examination long enough  
24 to resolve the issue of the admissibility of either  
25 or both of those settlement agreements.

1 MR. ZAKARIN: I'll pass on that, then,  
2 until later and we'll come back to it.

3 JUDGE BARNETT: Thank you.

4 JUDGE STRICKLER: Now that we're done  
5 with that, I just have two questions for the witness  
6 or two topics that come out of the documents, Mr.  
7 Zakarin, that you've just wanted to move into  
8 evidence.

9 The first one is Exhibit 321, sir, that  
10 you have in front of you, which is the testimony  
11 back in 2008 of --

12 MR. ZAKARIN: Mr. Quirk.

13 JUDGE STRICKLER: Mr. Quirk, thank you.  
14 In paragraph 57 of Mr. Quirk's testimony -- it's on  
15 page 30, sir. Let me know when you are there.

16 THE WITNESS: I have it.

17 JUDGE STRICKLER: Thank you. Mr. Quirk  
18 says or writes, "We have seen that there is price  
19 for our service above which consumers are not  
20 willing to pay. As it is now, we are all but  
21 handcuffed in our ability to price creatively to  
22 attract subscribers. There is the very real risk  
23 that if the rate that is set for this proceeding  
24 does not reflect this restriction on our business,  
25 we will be severely harmed. We must be able to

1 retain the flexibility in our business model and our  
2 pricing structure in order to be successful and  
3 continue to offer a legal way for consumers to fully  
4 explore the world of digital music."

5 Do you see that?

6 THE WITNESS: I do.

7 JUDGE STRICKLER: Is that a point that  
8 the -- that DiMA and the Services were making during  
9 those settlement discussions? I'm not asking you to  
10 agree with it. I'm asking whether or not they were  
11 making the point.

12 THE WITNESS: Well, they were certainly  
13 making an argument to pay less. That was consistent  
14 throughout the negotiations.

15 JUDGE STRICKLER: That's not my --

16 THE WITNESS: In terms of --

17 JUDGE STRICKLER: That's not my question.  
18 My question is pretty tailored. It's to paragraph  
19 57.

20 Did they make that point during the  
21 negotiations?

22 THE WITNESS: I'm sorry, Judge. I took  
23 two points from paragraph 57. The first sentence, I  
24 took as a point about total cost. The second point  
25 about flexibility was also something that was

1 clearly part of our settlement negotiation, which is  
2 why we ended up with a tiered structure that -- that  
3 had different price evaluations in each of the  
4 different tiers.

5 But that was clearly something that the  
6 Services were concerned about, was with both total  
7 cost and with flexibility of how they would price.  
8 I think we were --

9 JUDGE STRICKLER: Well, I'm not  
10 interested in the moment. I'm very interested  
11 generally as to your position, but I'm just -- right  
12 now I'm asking only about what they expressed to  
13 you.

14 THE WITNESS: I think it's absolutely  
15 fair to say that at the time they expressed a desire  
16 for flexibility in their pricing.

17 JUDGE STRICKLER: And now turning to the  
18 other exhibit that counsel showed you, that's the  
19 very next one in your book, sir, the written  
20 rebuttal testimony of Dan Sheeran. And it's page 8,  
21 paragraph 20.

22 Let me know, sir, when you're there.

23 THE WITNESS: Okay.

24 JUDGE STRICKLER: Okay? The paragraph  
25 talks about the performance right and the royalties

1 paid. The last sentence in that paragraph 20 -- in  
2 that last sentence, Mr. Sheeran testifies, "The fair  
3 price for all copies made to facilitate streaming is  
4 zero because the Copyright Owners are fully  
5 compensated for this activity through the royalties  
6 paid to the performance rights organizations."

7 Do you see that testimony by Mr. Sheeran?

8 THE WITNESS: Yes. May I read the full  
9 paragraph?

10 JUDGE STRICKLER: Absolutely, sure.

11 THE WITNESS: Yes.

12 JUDGE STRICKLER: Is -- is the part that  
13 I -- that I read, the quote, is that yet another  
14 thing that the -- that DiMA and the Services were  
15 advocating in their negotiations with you?

16 THE WITNESS: It was prior to their  
17 settlement. And then in the settlement, they  
18 abandoned that position. In addition, several of  
19 the DiMA members had -- prior to this proceeding,  
20 had contractually already conceded this point to us.  
21 And I don't recall whether Real was one of them or  
22 not.

23 JUDGE STRICKLER: Was the concession that  
24 they made that was embodied in the 2008 settlement  
25 the all-in concept of the rate?

1 THE WITNESS: The concession was that  
2 there was a mechanical payment due for the activity.

3 JUDGE STRICKLER: And was an additional  
4 part of the concession that was embodied in the 2008  
5 settlement, the incorporation of an all-in rate?

6 THE WITNESS: The all-in rate was a  
7 component that they asked for so that they would  
8 have some sense of price certainty when combining  
9 the two different rights. But, of course, that only  
10 consisted in some of the parts of the three-tiered  
11 system, and so depending on which of the categories,  
12 it may affect them or it may not.

13 JUDGE FEDER: For clarity, which  
14 activity?

15 THE WITNESS: For the -- any of the  
16 activity for the Subpart B five categories of  
17 settlement.

18 JUDGE FEDER: Thank you.

19 JUDGE STRICKLER: Thank you,  
20 Mr. Israelite.

21 BY MR. ZAKARIN:

22 Q. Do you recall approximately when the 2008  
23 settlement was embodied in regulations issued by the  
24 CRB?

25 A. My memory is that it -- it happened maybe

1 in early 2009, but I don't recall exactly when it  
2 became effective.

3 Q. Let's turn to Phonorecords II.

4 JUDGE STRICKLER: Just --

5 MR. ZAKARIN: I'm sorry.

6 JUDGE STRICKLER: Just before you do, I  
7 just want to get a clarification. I know we have  
8 --we have an outstanding evidentiary issue that  
9 relates to the settlement agreement itself. Your  
10 testimony is that the settlement agreement has  
11 language in it that goes beyond the regulations for  
12 -- of Phonorecords I, as we know and we can  
13 certainly take official notice of what the  
14 regulations say, that they say that future rates  
15 will be set under Subpart B de novo, and Subpart --  
16 there was no Subpart C back then. Subpart B de  
17 novo. And you say, as I -- as i just recounted,  
18 that there was other language in the settlement  
19 agreement with regard to perhaps the precedential  
20 value of further use of the settlement -- settlement  
21 rates.

22 Whatever that other language was, it was  
23 not incorporated into the regulations themselves. I  
24 think we're not in dispute about that. Do you know  
25 why that's the case?

1           THE WITNESS: No, I don't know why the  
2 language that we agreed to in our settlement  
3 agreement, if it didn't make it into the actual  
4 regulation, I don't know why that was the case. I  
5 wasn't serving as an attorney, obviously, in this  
6 proceeding. And -- and I don't know why it wouldn't  
7 have made it from the agreement itself into the  
8 regulation.

9           JUDGE STRICKLER: Thank you.

10 BY MR. ZAKARIN:

11           Q. Do you recall when the CRB called for  
12 participation in Phono II, approximately?

13           A. I believe it was in the beginning of  
14 2011.

15           Q. So that was roughly two years after the  
16 settlement, in effect, was adopted?

17           A. Yes. I recall that, because of the  
18 lateness of Phono I and then the Phono II staying on  
19 schedule, there was a very short window between the  
20 effective settlement taking place and the beginning  
21 of what was then Phono II.

22           Q. Do you have a recollection of the costs  
23 in Phonorecords -- Phonorecords I for the NMPA?

24           JUDGE STRICKLER: By costs, do you mean  
25 legal costs?



1                   MR. ZAKARIN: Legal costs. The overall  
2 cost of the proceeding. I wish it were only the  
3 legal costs.

4                   THE WITNESS: I do. Obviously, this was  
5 a new thing when the CRB was created. We had lived  
6 under -- I believe it had been 20 years of settled  
7 rates prior to that trial of Phono I.

8                   I don't think there had been a trial  
9 since 1980. And so I, obviously, had no experience  
10 with -- with the cost of going to a rate proceeding,  
11 but in Phono I, I believe NMPA spent somewhere  
12 between 15 and 20 million dollars.

13 MR. ZAKARIN:

14                Q. How did that compare to the NMPA's  
15 budget?

16                A. I recall thinking that the trial itself  
17 was costing approximately two years of my total  
18 budget.

19                JUDGE STRICKLER: Were there any special  
20 assessments made on the members to cover those  
21 costs?

22                THE WITNESS: I believe in -- what  
23 happened for Phono I is that we achieved a very  
24 large settlement with Bertelsmann, which had  
25 purchased Napster. And I believe that my membership

1 diverted some of the settlement money that otherwise  
2 would have gone into their pockets toward the  
3 payment of the bill for Phono I.

4 JUDGE STRICKLER: The whole of it or part  
5 of it? If you recall.

6 THE WITNESS: My recollection is -- well,  
7 it wasn't the whole of the settlement. I think it  
8 remains today as the largest copyright judgment or  
9 settlement in history, but it was part of it.

10 JUDGE STRICKLER: Thank you.

11 BY MR. ZAKARIN:

12 Q. In Phono II, was there any of the  
13 litigation activity that occurred in Phono I?

14 A. No. In Phono II, we were able to avoid  
15 almost all of the things that cost us in terms of  
16 expert and legal fees.

17 Q. Was the NMPA in a position in 2011, 2012,  
18 to afford another full-blown litigation on the scale  
19 of Phono I?

20 A. No. We were -- I was determined to not  
21 let that be something that the other side would know  
22 or see. So we certainly didn't talk about our  
23 challenge of having to fund another rate proceeding,  
24 but, privately, I don't know how we could have  
25 afforded to go to trial two years later after

1 finishing Phono I with the financial position that  
2 we were in.

3 JUDGE FEDER: Do your members weigh in on  
4 that?

5 THE WITNESS: Absolutely. My members --  
6 I have a Board of Directors made up of 18  
7 publishers, but they include all of the larger  
8 publishers. And so my Board -- even though there  
9 are hundreds and hundreds of publishers that are  
10 members, my Board represents a very large percent of  
11 the marketplace because of their size.

12 And so these -- these conversations and  
13 decisions with my Board very much represent a large  
14 chunk of the total industry. And they were very  
15 concerned about going to trial again in Phono II.

16 BY MR. ZAKARIN:

17 Q. And Phono II settled in or around April  
18 of 2012; is that right?

19 A. I remember early 2012. I don't recall  
20 the month.

21 Q. Okay. Between the CRB's announcement in  
22 January of 2011 and the settlement, do you recall  
23 the focus of the discussions that led to the  
24 settlement?

25 A. Oh, yes. The second trial was starting

1 very quickly after the first. Our view was that  
2 almost nothing had changed in the marketplace. Our  
3 views about the -- the streaming services were  
4 basically the same as they were from the first  
5 proceeding.

6 And there had not yet been significant  
7 movement in the marketplace with regard to the  
8 Subpart A categories, with regard to their  
9 importance. And so it felt almost as if we were in  
10 the exact same position starting Phono II that we  
11 were in when we settled Phono I.

12 Q. Was there any particular service or  
13 categories of service that -- as had been in 2008,  
14 that were the focus of the discussions that you had  
15 with your counterparts on the other side? And --

16 A. Yes.

17 Q. I'm sorry, go ahead.

18 A. So the settlement discussions in Phono II  
19 involved DiMA again and the RIAA again. And both  
20 the RIAA and DiMA were interested in adding  
21 categories to Section 115.

22 I think our view was that it was somewhat  
23 of a fool's errand because history had taught us  
24 that they didn't really know what was going to  
25 happen in the marketplace and that any opinions they

1 had about what might be important often turned out  
2 not to be true.

3 And that was particularly true with the  
4 record labels. My experience was. Not just from  
5 115 but also from larger business discussions with  
6 them about what was important to them. And so they  
7 did come with an interest in adding categories. And  
8 I believe our view was that we were open to  
9 discussing that, but we didn't think they could  
10 accurately predict what might be important.

11 MR. STEINTHAL: I'm going to object and  
12 move to strike the testimony about what the labels'  
13 perspectives were and even what the Services'  
14 perspectives were. This witness has no basis or  
15 foundation to testify to that.

16 JUDGE BARNETT: Sustained. He can  
17 testify to the fact that they requested these, but  
18 not to their motivations.

19 BY MR. ZAKARIN:

20 Q. Can you tell -- can you identify what, as  
21 you recall it, the services that they were focused  
22 on in the discussions in adding, or the categories  
23 of services?

24 A. Yes, they ended up being the categories  
25 that were added in Subpart C and some other

1 categories that ended up not being added to Subpart  
2 C because we couldn't agree, but there was a view  
3 that there might be an appetite for a limited  
4 service that only offered some narrow catalogue of  
5 music as opposed to a full library of music, and so  
6 that was one category that they cared about.

7           There was still a thought that ownership  
8 models would prosper, if they could figure out more  
9 ways to access the ownership models. And so the  
10 locker categories became something that was  
11 important because they thought it might help extend  
12 the life of the -- the ownership models and the  
13 download models. And so that was a category.

14           And then there was lots of discussion  
15 about how things were bundled together. And while  
16 there was one bundled category in the Subpart B  
17 rates, there was an interest in adding a different  
18 type of bundle in the Subpart C. But it was  
19 basically the categories that ended up being  
20 embodied in the Subpart C.

21           Q. Do you recall any extensive  
22 negotiations --

23           A. I'm sorry. There was one --

24           Q. That's all right.

25           A. There was one category that specifically

1 they asked for that didn't make it into the Subpart  
2 C, and that had to do with a free locker as opposed  
3 to a paid locker. And that was a category that  
4 Google wanted that we were not able to agree to in  
5 the Subpart C.

6 JUDGE STRICKLER: Why did you refuse to  
7 agree to that?

8 THE WITNESS: I believe our concern about  
9 the free locker was the same as what our concern is  
10 today about the free service, which is that we  
11 weren't interested in codifying a service that was  
12 being given away without us understanding more of  
13 the economics or how it might be good for us.

14 BY MR. ZAKARIN:

15 Q. Do you recall any extensive negotiations  
16 over anything that had been agreed to and  
17 incorporated in the 2008 settlement that was in  
18 Subpart B?

19 A. Yes. In the Subpart C categories, we  
20 were also discussing this element of what we called  
21 TCC, or total content cost. The theory for the  
22 publishers was that the record labels were in a free  
23 market, and unfortunately we, the songwriters and  
24 publishers, were bound by statutory rates, and that  
25 if there were some way for us to tie into what the

1 labels might be able to achieve in a marketplace,  
2 that could be good for us.

3 And so the TCC element, which was present  
4 in Subpart B, was also something that we wanted in  
5 Subpart C. Even though not much had changed over  
6 the two years, one of the things that I think we had  
7 some reflection on was how we defined the total  
8 content cost.

9 And we were interested in strengthening  
10 the language from the Subpart B into the TCC  
11 definitions in Subpart C. And we also wanted to  
12 include that improved language back into the Subpart  
13 B. And so I recall that being a topic of opening up  
14 the older settlement.

15 Q. Do you recall whether there was any  
16 discussion about changing the percentages or rates  
17 that were in Subpart B?

18 A. I'm sure we wanted higher rates. And I  
19 don't recall specifically what we proposed, but we  
20 ended up not changing the financial terms in Subpart  
21 B.

22 Q. There are a number of language changes  
23 that do exist in the -- in -- in the section of the  
24 regs under the 2012 settlement.

25 Were you involved at all in the sort of



1 language changes of the -- of the regulations?

2 A. I would have been involved on a policy  
3 level but not in a wordsmithing level or drafting  
4 level.

5 Q. Okay. Now, I want to turn -- and this is  
6 sort of, I think, the final section -- to the  
7 argument that's advanced here regarding public  
8 performance market and the fragmentation and  
9 fractional licensing.

10 And you address this in paragraphs 55  
11 through 66 of your rebuttal statement. You address  
12 the Services' argument about fragmentation of the  
13 public performance market.

14 Can you summarize for the Judges, without  
15 having to go through all of those paragraphs, which  
16 are in evidence already, your response to the  
17 arguments about the fragmentation of the public  
18 performance market?

19 A. Sure. I would start by saying that I  
20 don't think it's relevant. I don't think it  
21 matters. I don't think that how public performances  
22 are licensed has any relevance into what the proper  
23 valuation is of our intellectual property for a  
24 mechanical reproduction in this proceeding.

25 That being said, to the extent someone

1 else thinks it's relevant, I don't think there's  
2 fragmentation in the performance market at all. The  
3 performance market has evolved on its own without  
4 any direction really from government to where there  
5 are four performance rights organizations, or PROs,  
6 that act as collectives.

7           And if a licensee takes the license from  
8 the four PROs, then I believe in the history of the  
9 country there has never been a licensee that has  
10 been sued for infringement for having those blanket  
11 licenses from each of the four.

12           Two of the largest, ASCAP and BMI, are  
13 regulated by consent decree. There is debate among  
14 the PROs over what percent of the market ASCAP and  
15 BMI make up. I think there's general agreement that  
16 it's somewhere between 80 to low 90 percentile of  
17 the market. And with ASCAP and BMI, because they  
18 are forced to live under consent decrees that have  
19 been in place since 1941, they can't say no to a  
20 request for their license.

21           So if a licensee asks for the ASCAP or  
22 BMI license, you're licensed automatically. And  
23 it's just a question of setting a rate. And if you  
24 can't agree on a rate, you end up in front of a  
25 single federal judge in the Southern District of New

1 York.

2                   So for a licensee, for a large majority  
3 of the market, you simply have to ask ASCAP and BMI  
4 and you're then licensed. For the other two PROs,  
5 SESAC and GMR, which is a newer one, much  
6 smaller percent of the market, obviously, they're  
7 not bound by consent decrees, but the process for  
8 getting their license is also very simple. You  
9 negotiate a license for the blanket that they give  
10 for what they represent.

11                   And if you get the four licenses, you're  
12 completely licensed. If SESAC or GMR were to deny a  
13 license, it's their right to do that. Our  
14 performance right is not regulated by law. It is a  
15 free market right. And if an owner of a copyright  
16 or their representative doesn't want to license it,  
17 they're free to do that, although SESAC and GMR are  
18 in the business of licensing and collecting money.  
19 So you don't find the circumstance often of where  
20 licenses are denied. It just doesn't happen.

21                   MR. STEINTHAL: I have to object to the  
22 part of the testimony, again, that is so beyond his  
23 foundation, in particular, the testimony that the  
24 process is simple in getting licenses from GMR and  
25 SESAC. He has no foundation for so stating. I wish

1 it was true, but he has no foundation for that.

2 JUDGE BARNETT: Thank you. We don't need  
3 a narrative. Just identify the issue. Thank you,  
4 Mr. Steinthal.

5 MR. ZAKARIN: The witness certainly does  
6 have a foundation. He has been heavily involved in  
7 all of the proceedings relating to the PROs and all  
8 of the submissions to the Department of Justice, all  
9 of the submissions that went into the -- the federal  
10 courts. He is aware of the licensing procedures of  
11 GMR. Those are his members that have rights with  
12 GMR and with SESAC.

13 JUDGE BARNETT: Has this witness ever  
14 filed an NOI or sought a license or represented a  
15 songwriter or a performer who obtained a license  
16 from BMI or SESAC or --

17 MR. ZAKARIN: Those aren't done by --

18 JUDGE BARNETT: -- or ASCAP?

19 MR. ZAKARIN: Those are not done by NOI,  
20 in any event. They're automatically licensed by  
21 ASCAP and BMI.

22 JUDGE BARNETT: Sorry, my mistake.

23 MR. ZAKARIN: I know. SESAC and GMR are,  
24 you make a request for a license, and then you  
25 negotiate, and, indeed, there, I think,

1 Mr. Steinthal is well familiar with it.

2 MR. STEINTHAL: I am.

3 MR. ZAKARIN: Yes, you are. And so is  
4 the witness.

5 MR. STEINTHAL: And he is not. I just  
6 went through a two-week trial against SESAC.

7 JUDGE BARNETT: Okay. All right. Okay.

8 MR. STEINTHAL: That is not a process --

9 JUDGE BARNETT: Okay, we're on a tangent.  
10 We're on a tangent.

11 MR. ZAKARIN: We are.

12 JUDGE BARNETT: Okay? The objection is  
13 overruled.

14 BY MR. ZAKARIN:

15 Q. Let me turn to fractional licensing. Can  
16 you -- maybe it's useful to have a little framework.  
17 What is fractional licensing?

18 A. Fractional licensing is the concept that  
19 -- that copyrights, and in particular, in the music  
20 space, are often owned by multiple parties. If a  
21 copyright makes up a 100 percent whole, very often a  
22 song is written by more than one songwriter and you  
23 also may have publishers that have some ownership  
24 interest. So different parties own different  
25 fractions of that one song.

1                   And the way that you license your -- your  
2   copyright is traditionally done through you license  
3   the fraction that you control. And so that is what  
4   fractional licensing is.

5                   JUDGE STRICKLER: Your -- your testimony  
6   about fractional licensing, both now and in your  
7   written rebuttal testimony, is in response to  
8   Dr. Katz, the economist who appeared on behalf of  
9   Pandora, I believe, correct?

10                  THE WITNESS: Quite honestly, I don't  
11   know why I was asked to comment on fractional  
12   licensing.

13                  JUDGE STRICKLER: You mentioned Dr. Katz  
14   by name --

15                  THE WITNESS: Yes.

16                  JUDGE STRICKLER: -- in your written  
17   rebuttal testimony.

18                  THE WITNESS: Yes, but I don't -- so I  
19   assumed it was -- it was for that purpose, but I  
20   don't know what other purposes there would be for it  
21   to be relevant.

22                  JUDGE STRICKLER: Did you -- did you  
23   review Dr. Katz's written testimony or his -- and/or  
24   his -- his oral testimony here?

25                  THE WITNESS: Not his oral testimony. I

1 did read his written testimony at some point.

2 JUDGE STRICKLER: Did you review his  
3 economic rationale -- I understand you're not  
4 testifying as an economist. Did you -- did you  
5 review his economic rationale for why he thought  
6 fractional licensing was detrimental?

7 THE WITNESS: I don't recall reading  
8 beyond his written statement. And I guess you're  
9 not asking me my opinion about his view, but I don't  
10 recall reading beyond his written statement.

11 JUDGE STRICKLER: Okay. So you're not --  
12 you're not testifying to respond to any of the  
13 economic arguments that he made in his -- in his  
14 testimony as it relates to fractional licensing?  
15 You're here -- your testimony covers the legal  
16 aspects and the factual -- excuse me, the factual  
17 aspects of how fractional licensing has developed  
18 and exists in the context of the -- of the four --  
19 four PROs that now exist?

20 THE WITNESS: Well, I think it's -- it's  
21 beyond that. I think there is a legal aspect to  
22 this, which -- which I --

23 JUDGE STRICKLER: Well, you can talk  
24 about, but it's not -- you're only testifying to it  
25 because we're not eliciting legal conclusions from

1 you; we're getting facts from you.

2 THE WITNESS: No, and they wouldn't be my  
3 legal conclusions. They would be the legal  
4 conclusions of the Copyright Office, which I'm well  
5 familiar with.

6 I'm also familiar with the legal  
7 decisions of the judge that oversees the BMI consent  
8 decree who has made a ruling on this, but it  
9 wouldn't be my legal opinions.

10 JUDGE STRICKLER: I appreciate that  
11 you're pointing us -- pointing our attention to  
12 those opinions. So thank you for that.

13 MR. ZAKARIN: I think what I'll do, just  
14 to cap that.

15 BY MR. ZAKARIN:

16 Q. I will ask you to turn to Exhibit 327,  
17 which is also an Amazon-designated exhibit. And I  
18 ask you if you can identify the document, which  
19 actually is probably two combined documents. It's  
20 two letters and then a report. Do you have that in  
21 front of you?

22 A. Yes.

23 Q. And can you identify what it is? As I  
24 said, there's three -- there's three combined  
25 documents, actually.



1           A.    Yes.  This is a letter from Congressman  
2 Doug Collins, who is the -- a member of the House  
3 Judiciary Committee to the then Register, Maria  
4 Pollante, asking her opinion about this topic.  It  
5 is then the Register's letter in response, along  
6 with a, I guess you would call it, a paper that lays  
7 out the Copyright Office's position on the questions  
8 that were asked by the Congressman.

9           Q.    Relating to fractional licensing in the  
10 public -- in the performance market, among other  
11 things?

12          A.    Yes.

13               MR. ZAKARIN:  I offer Exhibit 327, Your  
14 Honors.

15               MR. STEINTHAL:  I object to it.  It is  
16 what it is.  If it's not offered for the truth of  
17 the matter, I suppose it can come in.

18               MR. ZAKARIN:  I'm not going to argue that  
19 the Register of Copyrights was not telling the truth  
20 when she submitted a report to Congress.

21               MR. STEINTHAL:  I'm not saying it is or  
22 isn't.  I know that the Justice Department actually  
23 disagreed with the position of the Copyright Office  
24 in a very long report after a two-year  
25 investigation.

1 MR. ZAKARIN: Actually, we can argue  
2 about what the Justice Department actually believed  
3 without --

4 JUDGE BARNETT: Let's not.

5 MR. ZAKARIN: I was going to say that  
6 we're not going to.

7 JUDGE BARNETT: So did Mr. Israelite cite  
8 this report in his written direct -- written direct  
9 or rebuttal testimony?

10 MR. ZAKARIN: I believe that he did, Your  
11 Honor. Let me -- give me a second.

12 JUDGE STRICKLER: Is it footnote 60 or  
13 65?

14 MR. ZAKARIN: It sounds -- it sounds  
15 about right anyway. Let me look.

16 JUDGE STRICKLER: Page 25. Thank you.

17 MR. ZAKARIN: Yes, and it -- it was a  
18 document that was even attached to his -- you're way  
19 ahead of me, Your Honor.

20 JUDGE STRICKLER: Well, I guess --

21 MR. ZAKARIN: It's a low --

22 JUDGE STRICKLER: -- a broken -- a  
23 stopped clock is right twice a day, you know?

24 MR. ZAKARIN: It's a low bar, but you're  
25 away ahead of me. It is --

1 JUDGE STRICKLER: We can both contest  
2 self-deprecation.

3 MR. ZAKARIN: 173, Your Honor. It was  
4 attached to the compendium of exhibits. And it is,  
5 again, as I note -- and it was designated by Amazon  
6 as an exhibit.

7 JUDGE BARNETT: Not that that overcomes  
8 any objection, just because it was designated by  
9 another party. 327 is admitted. It's public. It's  
10 for whatever weight it might have or influence.

11 (Amazon Exhibit Number 327 was marked and  
12 received into evidence.)

13 MR. ZAKARIN: I have no further  
14 questions, Your Honor.

15 JUDGE BARNETT: Okay. Thank you. Just  
16 so everyone is clear, what's happening with the  
17 designated/undesignated testimony, the Copyright  
18 Owners are to produce full transcripts for both of  
19 those witnesses by noon on Friday. The Services are  
20 to file their responses by the close of business on  
21 the 14th of April. Isn't that our last day? Aren't  
22 we going until the 13th?

23 JUDGE STRICKLER: No, because next week  
24 -- what's the last day on the schedule?

25 MR. ZAKARIN: 13th, I believe.

1 JUDGE STRICKLER: Which is a Wednesday?  
2 MR. ZAKARIN: I think it's a --  
3 JUDGE BARNETT: It's a Thursday.  
4 MR. ZAKARIN: I think it's a Thursday. I  
5 think Monday and Tuesday, which is the 10th and  
6 11th, we're off, and 12th and 13th we're on.  
7 JUDGE FEDER: 13th is a Thursday.  
8 JUDGE STRICKLER: Right.  
9 MR. ZAKARIN: Your Honor, if I can, on  
10 the transcripts, I don't know that we have access to  
11 the transcripts from -- the trial transcripts from  
12 the hearing.  
13 JUDGE STRICKLER: What -- we're talking  
14 about Phonorecords 1, right?  
15 MR. ZAKARIN: Yes.  
16 JUDGE STRICKLER: Was there a trial on  
17 Subpart B or did it settle out?  
18 MR. ZAKARIN: It settled out, I think,  
19 but after --  
20 JUDGE BARNETT: After the trial.  
21 MR. ZAKARIN: -- a considerable part of  
22 the trial. But we don't have access to the trial  
23 transcripts themselves.  
24 JUDGE STRICKLER: And you didn't cite to  
25 the trial --

1 JUDGE BARNETT: Your client must.

2 MR. ZAKARIN: No, we did not. And we did  
3 offer the full witness statements.

4 JUDGE BARNETT: Okay. Does your client  
5 have access to those transcripts?

6 MR. ZAKARIN: I tend to doubt it.

7 JUDGE BARNETT: They spent 15 million  
8 dollars. They should have a transcript.

9 (Laughter)

10 MR. ZAKARIN: Your Honor, it would have  
11 been 20, but they didn't get the transcripts.

12 JUDGE BARNETT: I see. Very well.  
13 Produce what you can get by noon this Friday. And  
14 then, Mr. Isakoff?

15 MR. ISAKOFF: Yes. Then there's the  
16 matter of the best evidence rule issue with the  
17 settlement agreements themselves that was the  
18 subject of a fair amount of colloquy, even after the  
19 objection was made. And we're hoping to get those  
20 agreements before the cross.

21 MR. ZAKARIN: Well, I have -- I have the  
22 2008. I'm sure that Mr. Steinthal has 2012.

23 MR. ISAKOFF: Well, perhaps if we can  
24 agree on what the 2012 document is, then my problem  
25 is solved, but I would object to proceeding with

1 just one of the two documents because I believe that  
2 they're different materially.

3 JUDGE BARNETT: After our recess, you can  
4 let me know who won the fist fight during the break.

5 MR. ZAKARIN: I can tell you now.

6 (Laughter)

7 JUDGE BARNETT: Pardon me?

8 MR. ZAKARIN: I can tell you now.

9 MR. ISAKOFF: He's a very tough guy. We  
10 established that.

11 JUDGE STRICKLER: Your only objection is  
12 a best evidence objection?

13 MR. ISAKOFF: It is a best evidence  
14 objection.

15 JUDGE STRICKLER: Your only -- no. Your  
16 only objection is a best evidence objection?

17 MR. ISAKOFF: And also completeness. If  
18 we're going to be talking about the settlement  
19 agreement for Phono I on this issue of what's  
20 precedent and what's not, then we must have the  
21 settlement agreement for Phono II on the same issue,  
22 because I believe they may be quite different.

23 MR. ZAKARIN: I suspect they are, but I  
24 don't have an issue with that.

25 JUDGE BARNETT: All right. You will let

1 me know at the end of the recess where we are on the  
2 settlement agreement production.

3 I misspoke. The responses to these other  
4 designated written direct testimony will be due on  
5 the -- by the close of business on the 7th, which is  
6 the Friday after they're produced.

7 Also, during our -- two housekeeping  
8 matters. There are mics on stands. One is hiding  
9 behind a pillar here, and one is over at the end of  
10 that desk. They should be nearer the tables that  
11 are missing desk-mounted microphones. So during the  
12 break, we'll try to get those so that you'll have  
13 access to those. You can always do your best Phil  
14 Donahue with those. Nobody in the room even knows  
15 who Phil Donahue is.

16 MR. ZAKARIN: I know. I know.

17 JUDGE BARNETT: Secondly, we did get,  
18 during this session this morning, we did get a  
19 computer alert that there is an emergency situation  
20 involving police, and everyone in the building is  
21 directed to avoid Independence Avenue and First  
22 Street Southeast until further notice.

23 So if during the break you were planning  
24 to go outside the building, don't. Okay?

25 We'll be at recess for 15 minutes.

1 (A recess was taken at 10:30 a.m., after  
2 which the hearing resumed at 10:52 a.m.)

3 JUDGE BARNETT: Please be seated. Is  
4 anyone going to cross-examine Mr. Israelite?

5 MR. ELKIN: I would like to start if I  
6 could, Your Honor.

7 JUDGE BARNETT: You may, Mr. Elkin.

8 MR. STEINTHAL: Let me first advise the  
9 panel that we've had a brief discussion about the  
10 documents, the agreements, and we're going to  
11 proceed with the cross and then see where we are  
12 after that and see if we need to reach a resolution.

13 JUDGE BARNETT: Makes sense. Thank you.

14 MR. ELKIN: Good morning, panel.

15 CROSS-EXAMINATION

16 BY MR. ELKIN:

17 Q. Good morning, Mr. Israelite.

18 A. Good morning.

19 MR. ELKIN: Just a couple of housekeeping  
20 items, if I can. First, panel, we're going to begin  
21 in an open session. Then we'll have a discrete  
22 portion in restricted, and then we'll finish in an  
23 open session.

24 JUDGE BARNETT: Thank you.

25 MR. ELKIN: I'll -- I'll alert the panel



1 to that.

2 BY MR. ELKIN:

3 Q. Mr. Israelite, you have a binder that has  
4 been placed in front of you. Just so you know  
5 what's in it, there's your direct written testimony,  
6 there's your rebuttal testimony, there's your  
7 deposition testimony, and then there's some  
8 exhibits, proposed exhibits, most of which you've  
9 seen in your deposition.

10 So, Mr. Israelite, you spent some time in  
11 your written direct testimony addressing the issue  
12 of compulsory licensing, correct?

13 A. Yes.

14 Q. And I believe it was paragraph 65, 64. I  
15 believe you went on at some length. Am I correct  
16 that it is your belief that the compulsory licensing  
17 scheme depresses the rates that Copyright Owners  
18 could get in a free market?

19 A. Yes.

20 Q. And am I correct that if you had your  
21 druthers, the correct standard that should be  
22 applied when determining mechanical license rates  
23 for interactive streaming music is the fair market  
24 standard?

25 A. My first preference would be not to have

1 a compulsory license, but to the extent we're forced  
2 to have one, we would favor a willing seller,  
3 willing buyer rate standard over the 801(b), yes.

4 Q. Thank you for that. Now, you believe  
5 that this case is about setting the proper value of  
6 a copyright owner's intellectual property right?

7 A. For mechanical reproductions, yes.

8 Q. And the Court is setting the value of the  
9 intellectual property for mechanical license  
10 purposes through this -- through this trial --  
11 through these trial proceedings, right?

12 A. Yes.

13 Q. And am I correct that you believe that  
14 the compulsory licensing scheme is unfair to the  
15 Copyright Owners?

16 A. It's not only my opinion. It's also the  
17 opinion of the Copyright Office.

18 Q. And you believe that Congress punished  
19 all songwriters and music publishers by implementing  
20 the compulsory license, correct?

21 A. I believe in 1909 when they imposed a  
22 compulsory license for the purpose of regulating  
23 player piano rolls, that the effect of that today,  
24 more than 100 years later, is to punish the  
25 songwriting and publishing community, yes.

1 Q. And the unfairness of the compulsory  
2 license should have a bearing, you believe, on the  
3 801(b) factors that govern this proceeding, correct?

4 A. I'm not sure I understand the question.

5 Q. Well, let me direct your attention to  
6 your direct testimony at paragraph 55.

7 JUDGE STRICKLER: Is that in your cross  
8 binder?

9 MR. ELKIN: Yes, it is Exhibit -- it's --  
10 first exhibit, Amazon Trial 329.

11 JUDGE STRICKLER: Which paragraph,  
12 counsel?

13 MR. ELKIN: 55.

14 JUDGE STRICKLER: Thank you.

15 BY MR. ELKIN:

16 Q. And, specifically, it starts on page 18  
17 and then carries over. And feel free, of course, to  
18 -- to review the entire paragraph. But I'm just  
19 really calling your attention to the last sentence  
20 of that paragraph, which begins on the first line at  
21 page 19, "the reason I feel it is important for me  
22 to do so is that I believe it bears upon the Section  
23 801(b) factors."

24 Do you see that?

25 A. Yes.

1 Q. That was your testimony, right?

2 A. Yes.

3 Q. You believe that to be the case today,  
4 right?

5 A. Yes.

6 Q. Now, you have always disapproved of the  
7 compulsory licensing system, correct, ever since you  
8 knew about it?

9 A. When I was hired in, I believe it was  
10 February 2005, I was fairly unaware of -- of that  
11 issue. And I believe I testified a few weeks after  
12 the start of my employment, and I believe there was  
13 language in my testimony prepared by an outside law  
14 firm that suggested some support, but since I  
15 personally became aware of the issue and probably  
16 now for, I would guess, 11 to 12 years of my tenure,  
17 I've felt that way, yes.

18 Q. Have you ever stated that you have always  
19 disapproved of the compulsory licensing system, ever  
20 since you knew about it?

21 A. I may have stated that. I believe that  
22 since I was familiar with what it meant to the  
23 industry, I felt that way, yes.

24 Q. So you have stated that? You have stated  
25 in the past that you always disapproved of the

1 compulsory license system, ever since you knew about  
2 it, correct?

3 A. I don't recall using those specific  
4 words, but I'm telling you what my belief is about  
5 how I feel about it.

6 Q. Okay. Well, let's take a look at your  
7 deposition testimony at page 78 for the panel. That  
8 is Amazon Trial Exhibit 328. I believe it's the  
9 third tab in the binder.

10 A. I'm sorry, which paragraph?

11 Q. It's -- first of all, it's Amazon Trial  
12 Exhibit 328.

13 A. Okay.

14 Q. And, specifically, I'd call your  
15 attention to page 78 starting with line 7 and going  
16 to page 79, line 15. Let me just read it so that  
17 it's clear because it goes on for a little bit.

18 "Question" -- and this is me questioning  
19 you. But you remember me questioning you at your  
20 deposition, correct?

21 A. I do.

22 Q. Okay. "Question: But you believe that  
23 the compulsory licensing scheme up until now has  
24 been useful to the music publishing industry?

25 "Answer: Overall, no. I think it has

1 been harmful to the songwriting and music publishing  
2 industry.

3 "Question: And for how long a period of  
4 time has it been harmful to them?

5 "Answer: It's hard for me to speak to  
6 the times as early as 1909 when it was the first put  
7 in place, and I'm sure there's general acceptance  
8 that it was unharmful for the initial rate that was  
9 set by Congress to basically stay unchanged for, I  
10 believe, over 60 years with no adjustment  
11 whatsoever.

12 "And then since the time that it first  
13 started becoming adjusted, I believe we've been  
14 playing a game of catchup ever since and have never  
15 gotten to the proper place in terms of valuation,  
16 but I also just inherently believe that the  
17 compulsory license is unfair and improper to put on  
18 a property owner unless there's a compelling reason.  
19 And I don't think that the reason that existed in  
20 1909, as I understand it, still exists today.

21 "Question: I" --

22 JUDGE BARNETT: I'm sorry to interrupt.

23 MR. ELKIN: Yes.

24 JUDGE BARNETT: This transcript is marked  
25 restricted over these passages.

1 MR. ELKIN: Well, Your Honor, good  
2 question. Let me express my thoughts with regard to  
3 that, as we know, that the rules do require within a  
4 30-day period after the deposition has been  
5 conducted for the party to actually designate or  
6 redesignate the transcript as restricted. We  
7 received no redesignation at all, unless somehow I  
8 missed it.

9 JUDGE BARNETT: Well, the question is,  
10 are we dealing with restricted information here? It  
11 seems not, but --

12 MR. ZAKARIN: Your Honor, I think both  
13 sides have not removed restrictions, I think, in the  
14 had hurly-burly of getting ready for trial, and I  
15 suspect that is one thing that both sides are guilty  
16 of. I agree, this is not restricted.

17 JUDGE BARNETT: That's fine. Thank you.  
18 I -- I get it.

19 So as long as no one is uncomfortable  
20 with this testimony in open, we'll continue. And I  
21 apologize.

22 MR. ELKIN: No, no, not at all. Let me  
23 just say, for the record, in case this crops up  
24 again, we've carefully chosen potential impeachment  
25 aspects of his deposition testimony, and I -- I will

1 clue the panel into areas where I believe it is  
2 restricted based on obvious factors.

3 JUDGE BARNETT: Thank you.

4 MR. ELKIN: Sure.

5 BY MR. ELKIN:

6 Q. So let me just continue because I think  
7 we were just getting to the line. I'm reading from  
8 line 9 on page 79. "And I don't think that the  
9 reason that existed in 1909, as I understand it,  
10 still exists today.

11 "Question: I understand. And you've  
12 always felt that way?

13 "Answer: Ever since I learned about it,  
14 I have, yes."

15 Did you give those answers to the  
16 questions that I put to you at your deposition as I  
17 just read them?

18 A. I believe so.

19 Q. Thank you. Now, Mr. Israelite, you just  
20 testified that you testified in Congress in 2005  
21 regarding, among other things, the compulsory  
22 licensing scheme, correct?

23 A. Yes.

24 Q. And that -- this was testimony that you  
25 provided to the Subcommittee on Courts, the



1 Internet, Intellectual Property of the Committee on  
2 the Judiciary, House of Representatives?

3 A. Yes.

4 Q. Why don't you turn to Exhibit -- what  
5 we've marked as 331 in your binder.

6 MR. ELKIN: Before I introduce this, I  
7 just -- panel, I just want to lay a foundation for  
8 this, if I may.

9 BY MR. ELKIN:

10 Q. I had asked you to turn, if you could,  
11 Mr. Israelite, without commenting specifically on  
12 the testimony quite yet, on page 9, it appears that  
13 there is some verbal testimony, and then your  
14 prepared testimony begins on page 10 and goes on  
15 through page 13.

16 Does that reflect the testimony that you  
17 provided to Congress on that date?

18 A. I have no reason to think it doesn't.

19 Q. That date, by the way, is March 8, 2005.

20 A. Correct.

21 MR. ELKIN: Your Honor, I would offer  
22 Amazon Trial Exhibit 331 into evidence.

23 MR. ZAKARIN: No objection.

24 JUDGE BARNETT: 331 is admitted.

25 (Amazon Exhibit Number 331 was marked and

1 received into evidence.)

2 BY MR. ELKIN:

3 Q. So let's turn to page 12. And this is  
4 part of the prepared testimony. And I direct your  
5 attention to the second paragraph, which reads, "We  
6 are grateful to Congress for its foresight in  
7 preserving the statutory compulsory license for  
8 musical compositions over the years, and amending  
9 Section 115 when necessary to maintain a level  
10 playing field for copyright users and rightsholders  
11 -- all for the ultimate benefit of the listening  
12 public. The compulsory license has made it possible  
13 over the past century for virtually any performing  
14 artist to record our members' musical compositions,  
15 while guaranteeing compensation to the songwriters  
16 for their creative efforts. Consumers have been the  
17 winners."

18 Do you see that?

19 A. I do.

20 Q. And that was prepared testimony that you  
21 provided to Congress, correct?

22 A. Yes, I believe this was the written  
23 testimony that was submitted.

24 Q. Okay. Now, you mentioned that this is  
25 when you first -- you provided this testimony after

1 a month into the job, right, as head of NMPA?

2 A. I think it was maybe a little less than a  
3 month, but around a month.

4 Q. And prior to that time, I believe, if you  
5 take a look at your testimony, you actually made  
6 Congress, the congressional members, aware of the  
7 fact that before you actually had assumed the  
8 position of head of the NMPA, in your role at the  
9 Department of Justice, you actually had occasion to  
10 work with NMPA and DiMA and other members of the  
11 music publishing community, correct?

12 A. I don't recall that from my testimony.

13 Q. Let me direct you back to the  
14 Exhibit 331, and specifically page 9. This is your  
15 -- your verbal testimony, the third paragraph. It  
16 reads, "I also had the privilege of working with  
17 members of the recording industry, the Digital Media  
18 Association, and songwriters, and I am hopeful that  
19 our previous experience of working together to  
20 combat theft of intellectual property can help us to  
21 work together in the future to meet the new  
22 challenges and opportunities of the information  
23 age."

24 Do you see that?

25 A. I do.

1 Q. Does that refresh your memory?

2 A. Well, no. Your -- your question, I  
3 believe, specifically said NMPA. And the reason why  
4 that caught me is because when I was hired for this  
5 position, I didn't know what NMPA was when they  
6 approached me. My -- my tenure at the Justice  
7 Department, serving as the chair of the intellectual  
8 property task force, I did not have interaction with  
9 NMPA.

10 Q. Right.

11 A. And when they approached me about the  
12 position, I recall being surprised that I had not  
13 had any interaction with them. And that's why when  
14 you had suggested in your question that my testimony  
15 suggested I had worked with NMPA, that didn't sound  
16 right to me.

17 Q. I apologize. I didn't mean -- yes, I did  
18 say that and I was wrong to say that. Forgive me  
19 for that.

20 I was trying to, basically, ask you in a  
21 general way whether you had worked with the various  
22 players in the music publishing area. You did --  
23 you have worked with -- you worked with DiMA,  
24 certainly, before you assumed the position at the  
25 NMPA, correct?

1           A.    I was familiar with DiMA.  I was most  
2 familiar with the RIAA.  My focus on the task force  
3 was mostly involving theft of intellectual property.

4           Q.    Right.

5           A.    And at that time, the RIAA was very  
6 active on that question, and music was just a  
7 subpart, obviously, for other copyright agencies.

8           Q.    And you referenced songwriters in your  
9 testimony, that you had worked with them previously,  
10 correct?

11          A.    I referenced songwriters specifically,  
12 yes.

13          Q.    Thank you for that.

14                And now, from and after that time that  
15 you testified in 2005, you had occasion to work with  
16 members of Congress to help introduce or lobby for  
17 the passage of reform to Section 115 of the  
18 copyright statute, right?

19          A.    Yes.

20          Q.    That's known as SIRA, right?

21          A.    SIRA was the name of one particular bill  
22 that we worked on with Congress, yes.

23          Q.    And now --

24                JUDGE FEDER:  What does that acronym  
25 stand for?

1                   THE WITNESS: Please don't blame me  
2 because it's not accurate, but it's supposed to  
3 stand for Section 115 Reform Act, which would make  
4 it SORA, but they titled it SIRA. And that's what  
5 we went with.

6 BY MR. ELKIN:

7           Q. And -- and we'll talk a little bit about  
8 that in a moment, but just so that it's clear, this  
9 was an effort that you undertook with respect to  
10 actually implementing changes to Section 115,  
11 correct?

12          A. It was a cooperative effort with the  
13 Digital Media Association, yes.

14          Q. And you worked with Jonathan Potter of  
15 DiMA for at least a year to try to get passage of  
16 this new legislation?

17          A. I don't recall the length of time, but I  
18 did work with Jonathan Potter to -- to promote this  
19 legislation, yes.

20          Q. And you testified on direct that as part  
21 of your responsibilities as head of the NMPA, that  
22 you write articles related to the industry, correct?

23          A. I do.

24          Q. And sometimes you -- you provide -- you  
25 write op-Ed pieces?

1 A. Often.

2 Q. Take a look at Exhibit 333. Before I  
3 introduce this, I just want to ask you whether 333  
4 is -- if you refer to the second page of the  
5 exhibit, is that -- in the lower left-hand portion,  
6 there's an article entitled "SIRA Provides Framework  
7 For Digital Music Future."

8 Can you identify that article as  
9 something that you and Mr. Potter co-wrote, which  
10 was published in Billboard in the year -- on or  
11 about July 29, 2006?

12 A. I don't recall if I actually wrote it,  
13 but it was certainly submitted by Jonathan and  
14 myself under our names.

15 Q. Okay.

16 MR. ELKIN: Panel, I'd like to move into  
17 evidence Amazon Trial Exhibit 333.

18 MR. ZAKARIN: No objection.

19 JUDGE BARNETT: 333 is admitted.

20 (Amazon Exhibit Number 333 was marked and  
21 received into evidence.)

22 BY MR. ELKIN:

23 Q. Now, if you would take a look at the --  
24 there's a picture there. To the -- to the left is  
25 Mr. Potter, right?

1           A.    Yeah, Mr. Potter is the -- the gentleman  
2 on the left.

3           Q.    Yes.  And you're the handsome man with  
4 the longer hair on the right?

5           A.    If you need to know just how long ago  
6 this was, you can just look at my hair in the  
7 picture.

8                   (Laughter)

9           Q.    And the Capitol in between.  So this is  
10 an article that you and he co-wrote and which was  
11 published in Billboard.  I assume regardless of  
12 who -- where the text originated, you actually  
13 approved of -- of this piece before it actually got  
14 published, right?

15          A.    Of course.  I likely didn't write it, but  
16 I certainly approved it.

17          Q.    All right.  You have no reason that the  
18 statements set forth there weren't approved by you  
19 at the time, right?

20          A.    I think I just said I certainly approved  
21 it.

22          Q.    Okay.  So I'm going to ask you about  
23 certain aspects of this, if I could.  And I'm going  
24 to blow this up on the screen to make it easy for  
25 everyone to follow, if we could.



1           The first part of it that I'm going to  
2 direct your attention to -- and feel free to review  
3 that; I know we reviewed it at your deposition -- is  
4 really the -- the aspect which deals with Section  
5 115 reform.

6           You write, "We have joined together to  
7 support legislation that will allow the music  
8 industry to jump aboard the digital revolution,  
9 providing music fans with more choices, creators  
10 with more opportunities and royalty-paying  
11 innovators with more freedom. The proposed Section  
12 115 Reform Act of 2006 (SIRA) would replace a nearly  
13 century-old system that grants the right to  
14 reproduce or distribute a composition only on a  
15 song-by-song basis."

16           You were -- so this was right around the  
17 time that you were advocating for the passage of the  
18 Section 115 Reform Act? Is that right?

19           A. I don't recall the -- the date of whether  
20 the legislation -- where it was in the process, but  
21 it was certainly contemporaneous with our efforts to  
22 promote the SIRA Act.

23           Q. And that's one of the reasons why you and  
24 Mr. Potter teamed up to write this piece that --  
25 that got published in Billboard, right?

1           A.    I -- I don't recall, again, what the  
2 timing was of this in relation to what was going on  
3 on the congressional calendar, but it certainly  
4 would have been somewhere related for the timing of  
5 the bill for it to have been relevant for us.

6           Q.    Okay. And let's -- I want to read  
7 another passage and ask you a question about what  
8 SIRA was designed to do. "SIRA solves the problems  
9 with the existing system by creating a statutory  
10 blanket licensing method that will allow digital  
11 music services to make a simple filing for all  
12 musical works."

13                    You were touting that as a good thing,  
14 correct?

15           A.    Yes.

16           Q.    And then let's take a look at another  
17 section where you write, "The neutral Copyright  
18 Royalty Board will set rates for digital uses, based  
19 upon an independent evaluation of what each activity  
20 is worth."

21                    Now, the CRB, you were referring to the  
22 CRB setting rates based upon an individual -- an  
23 independent evaluation of what each activity is  
24 worth, correct?

25           A.    Oh, yes, physical required a very

1 different rate than -- than streaming did.

2 Q. And when you refer -- your reference to  
3 each is whatever activities were going to be  
4 provided was going to be different than what had  
5 been previously decided, which was on a song-by-song  
6 basis, right?

7 A. Well, it didn't -- no, it didn't  
8 necessarily differ as to whether it was song by song  
9 or not. It differed into the method of the  
10 reproduction.

11 So the rate structure for -- for physical  
12 products, which had always been a penny rate per  
13 sale per song, didn't translate into a streaming  
14 model. And so there was a recognition that  
15 streaming would require a different structure.

16 Q. Well, nonetheless, what you were trying  
17 to -- the point you were making here, was it not,  
18 that it was a good thing that the CRB would be in a  
19 position to actually address each specific activity  
20 that was at issue in terms of how it should be  
21 compensated for purposes of mechanical publishing  
22 rate-setting purposes, right?

23 A. No, I wouldn't -- I wouldn't say that I  
24 thought it was a good thing. I would say that  
25 within the context of living with the compulsory

1 license, that the idea was that we would try to  
2 empower a licensing process that could adapt to new  
3 digital types of -- of applications.

4 Q. Okay. But, in any event, you -- you  
5 understood, at least, what the CRB was going to do  
6 if this legislation passed was to look at each  
7 specific activity that was at issue in the case,  
8 right?

9 A. I don't -- I wouldn't say each specific  
10 activity. I would say that it was designed to  
11 provide a licensing framework for what was then a  
12 new type of mechanical reproduction that didn't fit  
13 with your -- the traditional pricing methods.

14 Q. Okay. Well, let's take a look at what  
15 you say with regard to who was going to be  
16 benefitting from this legislation.

17 Songwriters. "Songwriters, in  
18 particular, benefit from this proposed legislation.  
19 First, SIRA will ensure copyright owners their  
20 guaranteed rights in the digital world, including  
21 those associated with interactive streaming of their  
22 works. This means that songwriters will protect  
23 their performance and mechanical rights in business  
24 models that implicate both rights. Because  
25 interactive streaming could some day be the dominant

1 method of delivering music to the consumers, this  
2 victory could be one of the most significant for  
3 songwriters in the history of copyright protection."

4               So you actually -- you and Mr. Potter  
5 were predicting that streaming music would become --  
6 back in 2006, you were predicting that streaming  
7 would become the dominant platform for music  
8 delivery, correct?

9               A. Well, I think we used the word "could,"  
10 but I certainly felt that it could some day, was  
11 fairly prophetic ten years ahead of the time that it  
12 -- that it happened.

13              Q. And you thought SIRA was going to be a  
14 benefit to the Copyright Owners, right?

15              A. Yes, I thought that SIRA would be a  
16 benefit to everyone for the purpose of more  
17 efficient licensing of the rights.

18              Q. Let's talk about what you said concerning  
19 how the music providers, legitimate music providers  
20 would dramatically expand the number of songs. You  
21 write, "The biggest winner, however, will be music  
22 fans. Legitimate digital music providers will  
23 dramatically expand the number of songs they offer  
24 consumers."

25              So you recognized that -- that SIRA, if

1 it were passed, would dramatically expand the number  
2 of songs offered to consumers, correct?

3 A. Certainly.

4 Q. And, finally --

5 A. In a legal way, I should say. In a legal  
6 way.

7 Q. Yes, because at that time, what was  
8 rampant in the marketplace was piracy, right?

9 A. It was. And -- and we were very  
10 concerned about that.

11 Q. And so let's turn to what you say about  
12 that. "SIRA also helps the entire music industry  
13 fight its biggest threat -- piracy. With an entire  
14 universe of copyrighted songs at their disposal,  
15 digital music providers will be better able to  
16 compete with illegal networks that today offer a  
17 wider variety of music."

18 And there's no doubt in your mind that  
19 this legislation was going to -- with all of the  
20 changes, was -- would have the effect of helping  
21 create another tool to address piracy, correct?

22 A. Just to be clear, it -- it was helping in  
23 the legal licensing of the rights. The Services  
24 themselves are what would have helped combat the  
25 piracy, but I was interested, as was Mr. Potter, and

1 I think everyone in the industry, of trying to  
2 figure out how to make this new thing work.

3 Q. Right.

4 A. And I was concerned that the licensing  
5 mechanisms for the old models didn't work well for  
6 this new model.

7 Q. Right. So the compulsory licensing  
8 basically adopted the proposed changes in SIRA that  
9 would eventually have helped address the issues of  
10 piracy, right? Isn't that what you were saying?

11 A. I want to be clear about this because  
12 SIRA, obviously, hasn't happened and we've still  
13 seen the type of explosive growth in interactive  
14 streaming that we hoped would happen ten years  
15 before it did. And so it wasn't that I thought that  
16 SIRA was a necessary element for streaming to  
17 survive and to thrive and to grow. It has turned  
18 out not to be.

19 It's just that I thought it would help  
20 the licensing process work better. I still believe  
21 that. And that's why we did it, is to make the  
22 licensing process more efficient.

23 Q. And all of this occurred, your efforts to  
24 try to perpetuate the compulsory licensing scheme,  
25 albeit with these changes, you know, existed through

1 2006, right?

2 A. I'm sorry, I didn't understand.

3 Q. Yes. The bottom line here is that in  
4 2006, after you had been on the job for more than a  
5 year, you weren't seeking to abolish the compulsory  
6 licensing scheme, were you?

7 A. Oh, no, that's not true. I absolutely  
8 was. DiMA was very much against getting rid of the  
9 compulsory licensing process. And so instead of  
10 trying to promote a bill fighting with DiMA, it was  
11 my judgment that this was something that we could  
12 agree on to make an improvement in the compulsory  
13 licensing process, but it was very clear that our  
14 preference would have been to get rid of the  
15 compulsory license. If that were not possible,  
16 then, of course, I would be interested in making it  
17 work better. And that's what this effort was.

18 Q. Right. But what you were saying in this  
19 -- in this article, you were touting the benefits of  
20 compulsory licensing to expand the activities that  
21 the CRB could actually address in this type of a  
22 proceeding, right?

23 A. I disagree completely. I do not think  
24 this article in any way touts the benefits of  
25 compulsory licensing. I think what this article



1 does is tout the benefit of, within a compulsory  
2 license, how it can work for interactive streaming  
3 licensing, which wasn't working well.

4 Q. I -- I appreciate that testimony, and the  
5 document, as they say, speaks for itself. Let me  
6 ask you a question.

7 JUDGE STRICKLER: Before you get to the  
8 next one. In the article you talk -- you talk about  
9 piracy, correct? And you indicate that streaming --  
10 and from your testimony today, that streaming is in  
11 some sense an antidote to the problem of piracy; is  
12 that correct?

13 THE WITNESS: I would say a little bit  
14 more nuanced than that, Judge. I think that legal  
15 digital services were -- are and were an important  
16 factor in combatting piracy. Back in 2006, the  
17 dominant form of consumer preference was actually  
18 downloading at that time. It wasn't streaming.

19 And we were very interested in trying to  
20 move individuals who were stealing copies into legal  
21 models, and the streaming model, which was, in July  
22 of 2006, a brand-new concept, it wasn't yet in any  
23 way a popular activity for consumers, but it was  
24 something that we hoped would grow and become  
25 something that could also draw people away from the

1 idea of stealing copies.

2 JUDGE STRICKLER: Other than streaming,  
3 was -- was your trade association engaged in  
4 attempts to figure out other ways to stop the  
5 illegal piracy through law enforcement methods?

6 THE WITNESS: Very much so, although I  
7 think it's fair to say that my trade association  
8 took a very different approach than that of the  
9 record labels. The record labels at that time took  
10 a very aggressive legal approach against individuals  
11 who were doing the stealing. And as many people  
12 will remember, there were a lot of lawsuits filed by  
13 record labels against individuals.

14 The perspective of the publishers was a  
15 little bit different. We focused more on the  
16 business interests that were trying to profit from  
17 the theft. And that's why we had a very active  
18 litigation program going after not the individuals  
19 who were stealing but, rather, the businesses that  
20 were helping facilitate the stealing. And I  
21 mentioned earlier the Bertelsmann case. And that  
22 would be one example of what the NMPA did legally to  
23 deal with that.

24 We also had another case that went to the  
25 Supreme Court on -- the illegal download case. We

1 brought other enforcement actions but never against  
2 individual consumers. I don't like to call them  
3 customers. If they were stealing, they weren't  
4 really a customer. But not against individuals.

5 JUDGE STRICKLER: So did you feel that  
6 the law enforcement approach and streaming as a  
7 competitor to piracy combined to -- as tools to  
8 fight piracy?

9 THE WITNESS: My views, which were mostly  
10 formulated at my time at the Justice Department,  
11 less so in my year or so at NMPA, was that you had  
12 to attack this problem from many different angles,  
13 and that law enforcement was an important one. I  
14 thought the government's law enforcement was an  
15 important factor, separate from the civil rights of  
16 the property owners.

17 And providing legal alternatives was  
18 clearly an important factor in that. Because I  
19 thought the industry was slow to adapt to models  
20 that consumers wanted.

21 JUDGE STRICKLER: Thank you.

22 BY MR. ELKIN:

23 Q. A moment ago, Mr. Israelite, you made  
24 reference to streaming services. There were  
25 streaming services in effect in 2006, right?

1           A.    I'm sure there were ones in effect.  I  
2   don't believe they -- they had any size to be  
3   anything more than a blip on the radar screen at  
4   that time.

5           Q.    So you're aware Yahoo had purchased  
6   Musicmatch, right?

7           A.    I don't specifically recall that but --

8           Q.    You don't deny that, do you?

9           A.    I certainly don't deny it.  I know you  
10   represented Yahoo, so you would know.

11          Q.    With regard to AOL, AOL also had a  
12   streaming service, right, Now?  Do you remember  
13   that?

14          A.    I don't recall.  Again, there were  
15   several that took advantage of our rateless license  
16   contract, and I don't remember the names of all of  
17   them.  There were several, but none of them were  
18   deemed significant at the time.

19          Q.    And CBS had last.fm, right?

20          A.    Again, I don't recall that specific one.

21          Q.    And Microsoft had a service as well?

22          A.    I don't recall Microsoft service either.

23          Q.    Okay.  Now, turning to the 801(b)  
24   factors, you reference them in your written direct  
25   statement.  Again, that is the first -- your first

1 -- Amazon Exhibit 329.

2 A. Are we on my written direct?

3 Q. Yes, your written direct.

4 A. Okay.

5 Q. It's footnote 15.

6 A. Footnote 15. Okay.

7 Q. It's page 18.

8 A. Yes.

9 Q. Right there. And now, I'm correct that  
10 you're familiar with these factors, right?

11 A. Yes, I've -- I've reviewed the 801(b)  
12 factors before.

13 Q. Now, am I correct that you've been on  
14 record as saying that two of these factors depress  
15 the value of music, in other words, they cut against  
16 the rightholders obtaining higher rates?

17 A. I don't think that's accurate. I think  
18 I've -- at least I tried to phrase it always as they  
19 could be used to lower the rates, not that they  
20 have, but they could be used in that way.

21 Q. So you -- is your testimony that you have  
22 never been on record as saying that two of these  
23 factors depress the value of music? Is that  
24 correct?

25 A. No, I -- I'm not attempting to recall the

1 language I used each time I've spoken about this  
2 issue. I'm telling you that I've attempted to  
3 express what my feeling is about it, which is that  
4 the two of the factors could be used to harm the  
5 value.

6           If I -- if I have been inartful in how  
7 I've said it in the past, then I'm sure you can show  
8 me that, but I'm not testifying that I may never  
9 have said it inartfully before.

10          Q. Well, I just want to be -- I want to be  
11 fair to you and fair to the proceeding. Why don't  
12 we take a look at Amazon Trial Exhibit 332.

13          A. Okay.

14          Q. The first page is that -- that's another  
15 picture of a handsome man. Do you recognize him?

16          A. This is, what, seven years later and much  
17 shorter and grayer hair, yes.

18          Q. Okay. And this is -- this is from the  
19 publication called the Creative Intelligentsia,  
20 which I will introduce in a moment, but this is an  
21 interview that you provided to this -- to this  
22 publication on or about -- or it was published on or  
23 about October 1, 2013, right?

24          A. I think, as we discussed in my  
25 deposition, I don't have any recollection of this

1 specific interview, but I have no reason to doubt  
2 it's an accurate reflection of my interview at the  
3 time.

4 Q. Okay.

5 A. But I don't recall doing it.

6 Q. Okay.

7 MR. ELKIN: So I would like to introduce,  
8 if I could, panel, Amazon Trial Exhibit 332.

9 MR. ZAKARIN: No objection.

10 JUDGE BARNETT: 332 is admitted.

11 (Amazon Exhibit Number 332 was marked and  
12 received into evidence.)

13 MR. ELKIN: Thank you.

14 BY MR. ELKIN:

15 Q. Take a look at page -- this is -- if you  
16 go through this -- and we did it at your deposition.  
17 I'm not going to do it today. But this is a  
18 question and answer --

19 A. I'm sorry, what page?

20 Q. Go to page 48. In the middle of the  
21 page, there's a heading that says What Are Your  
22 Biggest Issues?

23 A. Yes.

24 Q. And if you skip down -- you can read the  
25 whole thing, of course, but if you skip down six

1 lines down, I'm just going to read it into the  
2 record.

3 JUDGE BARNETT: We're not seeing page  
4 numbers.

5 MR. ZAKARIN: Where is 48? Yeah.

6 MR. ELKIN: 48?

7 MR. ZAKARIN: Is it the right-hand corner  
8 where it --

9 MR. ELKIN: Yes, it's the right-hand  
10 corner. It says 48/71.

11 JUDGE BARNETT: Thank you.

12 MR. ELKIN: Sure. Sorry about that.

13 BY MR. ELKIN:

14 Q. And let me just read to you the language,  
15 once everyone is there. "On the music interests,  
16 there are some things that I think are very  
17 important. Number 1, if we are going to be told  
18 that we must continue to operate under a compulsory  
19 license for our reproductions, at a minimum, the  
20 rate standard used by the Judges should be willing  
21 seller, willing buyer. Which means, the three  
22 Judges try to approximate what would happen in a  
23 free market versus the current rate standard, which  
24 is an 801(b) standard that uses four factors, two of  
25 which depress the value of our intellectual



1 property."

2 Is that the answer that you gave to the  
3 question what are your biggest issues?

4 A. I have no reason to think it's not an  
5 accurate reflection. I believe it was either a  
6 phone or in-person interview, so I was, obviously,  
7 speaking and not writing, but I have no reason to  
8 think it's inaccurate.

9 Q. Now, the two factors to which you made  
10 reference, those are factors B and D, correct?

11 A. I believe that's correct, but I just want  
12 to refresh. I haven't looked at 801(b) in a little  
13 while. I believe that's correct.

14 Q. Now, the B factor for the record, it's a  
15 fair return under existing economic conditions,  
16 correct?

17 A. That would be shorthand for it.

18 Q. Right. And the D factor, again  
19 shorthand, is the minimization of disruption for the  
20 structure of industries involved and on generally  
21 prevailing industry practices, correct?

22 A. Correct.

23 Q. Now, in your testimony, both in your  
24 written direct and I think you actually testified  
25 yesterday in your direct, you made reference to a

1 notion of an inherent value of music.

2 Do you remember that?

3 A. Yes.

4 Q. And is it your testimony that the  
5 inherent value of music should drive the panel to  
6 adopt the rate and structures proposed by the  
7 Copyright Owners?

8 A. I think that our -- our proposal over  
9 rate and structures take into account these 801(b)  
10 factors. It may be the inherent value would even be  
11 higher, but we attempted to make a rate proposal  
12 that took into consideration the 801(b) factors.

13 JUDGE STRICKLER: Sir, how do you define  
14 the inherent value of the -- of music?

15 THE WITNESS: I actually prefer that I  
16 don't define it but that whoever owns an individual  
17 copyright is the one to define it. I think that  
18 would be the most appropriate definition of it.  
19 What someone is willing to license it for would be  
20 that inherent value to that owner. That would be my  
21 view.

22 JUDGE STRICKLER: You would equate that  
23 with market value or --

24 THE WITNESS: That would be the market  
25 value, yes.

1 JUDGE STRICKLER: Thank you.

2 BY MR. ELKIN:

3 Q. So, ultimately, in response to Judge  
4 Strickler's question, the determination of the  
5 inherent value of music is a subjective  
6 determination by the copyright owner, correct?

7 A. I think it's -- it's subjective to each  
8 individual copyright owner, but in this proceeding,  
9 we're -- we're forced to set a rate that is blanket  
10 universal without regard to that, so you have to  
11 come up with a rate that attempts to evaluate that  
12 using the factors.

13 Q. Right. And the term, "the inherent value  
14 of music," those words, is not specifically found in  
15 801(b), correct?

16 A. No, the language is -- is not found in  
17 801(b). I think the concepts are there, but the  
18 language -- the word itself is not there.

19 Q. And the inherent value of music, again,  
20 is whatever the copyright owner believes in his or  
21 her view is correct, right?

22 A. My view is for that copyright owner, if  
23 they want to price their property in a free market  
24 at a certain number, I think for that property  
25 owner, that would be an inherent value to that

1 owner. That's my view of -- of what it should --  
2 how it should work. That's not the system we have,  
3 but that's my view of how it should work.

4 Q. Right. And that's what drives the  
5 proposal that you seek in this case, right?

6 A. No, I think I answered earlier that our  
7 proposal was designed to take into account the  
8 801(b) factors and that if we were just trying to  
9 describe an inherent value, we may have actually  
10 proposed something higher.

11 Q. Well, do you -- do you deny your written  
12 testimony that you've made reference to the fact  
13 that the inherent value of music should -- should be  
14 the basis upon which the Court should consider the  
15 proposed rates by the Copyright Owners?

16 JUDGE STRICKLER: Before you answer that  
17 question, can I just hear his last answer back,  
18 please.

19 THE REPORTER: "Answer: No, I think I  
20 answered earlier that our proposal was designed to  
21 take into account the 801(b) factors and that if we  
22 were just trying to describe an inherent value, we  
23 may have actually proposed something higher."

24 JUDGE STRICKLER: So when you say "we may  
25 have proposed something higher," are you saying you

1 did not propose something higher; you may have, if  
2 you had proposed an inherent value? I just want to  
3 make sure I understand what you said.

4 THE WITNESS: I think that's what I mean,  
5 is that if -- if we were just being asked the  
6 question how much do you think your property is  
7 worth, obviously every individual property owner, I  
8 would prefer answer that for themselves, like they  
9 get to do in other areas of their business where  
10 they're in a free market. For the purpose of this  
11 exercise, I likely would have gone back to my  
12 membership and asked them to just tell me what  
13 number would you like to charge for your property?  
14 Unfortunately, that's not the system we have. And  
15 so, instead, the process we went through to come up  
16 with our rate proposal did take into account the  
17 factors that are being used by this Court in  
18 determining the rate.

19 JUDGE STRICKLER: Which you understand to  
20 be lower than the inherent value?

21 THE WITNESS: Again, I can't speak for  
22 any one of my individual members as to what number  
23 they would put on it for themselves. If you're  
24 asking me do I think that the songs have even  
25 greater value to these Services than what we

1 proposed, I would say yes, but I think our proposal  
2 was meant to be a reasonable proposal under the  
3 factors.

4 JUDGE STRICKLER: Thank you.

5 BY MR. ELKIN:

6 Q. So let me just ask a related question.

7 Do you believe that the inherent value of  
8 music should drive the rates to be consistent for  
9 all categories of interactive streaming?

10 A. I believe we're only proposing one  
11 category of interactive streaming. And so I don't  
12 understand the question.

13 Q. So the -- you never recall having  
14 answered that -- you never recall having heard that  
15 question and understood it in the past?

16 A. I -- I don't recall. You're asking me  
17 now about it, and I'm giving you my -- my response  
18 to it now.

19 Q. I appreciate that too. Let's take a look  
20 at page 65 of your deposition. That's Amazon Trial  
21 Exhibit 328. And page 65.

22 And you can feel free to read before and  
23 after. I'm going to read to you the language that I  
24 want to call to your attention. And it begins --

25 A. Can I get there first?

1 Q. Sure. Let me know when you get to page  
2 65.

3 A. I'm there now.

4 Q. Beginning on line 11.

5 "Question: So I understand, and you're  
6 on record, 801(b) governs and I get that. But you  
7 believe that the inherent value of music should  
8 drive the rates to be consistent for all categories  
9 of interactive streaming, correct?

10 "Answer: I do."

11 You understood, do you not, what I meant  
12 before you answered that question, right?

13 A. I don't -- I don't see that as  
14 inconsistent. I mean, we're proposing one category  
15 of interactive streaming.

16 Q. Thank you for that. Now, you testified  
17 on direct that you pick your battles in terms of  
18 when you fight and when you don't fight in terms of  
19 seeking a CRB determination. Is that correct?

20 A. I don't recall using the phrase "pick my  
21 battles," but it would -- that's an accurate  
22 description of how I view the CRB, yes.

23 Q. I -- I don't have a transcript in front  
24 of me. I'm just remembering from my feeble memory  
25 from yesterday.

1                   But in the main, I think that was the  
2 point that you were making, correct?

3           A.    Yes.  I -- I have a philosophy about the  
4 right approach.  And my philosophy you could maybe  
5 summarize as pick your battles, but I would -- I  
6 actually think it's a little different in that it's  
7 not just picking the battle that you think you can  
8 win; it's picking the battle that has economic  
9 importance.  I guess that would be how I would put  
10 it.

11          Q.    Right.  And before you decided in  
12 Phonorecords I -- and I'm going to just tread on  
13 this very lightly because I'm not going to --  
14 another service is going to be focusing on this to  
15 some extent, to a greater extent.  You -- you  
16 decided not to fight over Subpart B because  
17 ultimately you didn't think that interactive  
18 streaming was going to be any big deal because it  
19 was in its embryonic state and there was nothing to  
20 fuss over, right?

21                   JUDGE STRICKLER:  Are you referring to  
22 the 2008 period or the 2012 settlement?

23                   MR. ELKIN:  2008.

24                   JUDGE STRICKLER:  Thank you.

25                   MR. ELKIN:  Sorry.



1                   THE WITNESS: At the time of the 2008  
2 settlement, our primary concern was the rate that  
3 was going to be set for permanent digital downloads.  
4 That was the shift in consumer behavior from  
5 physical product to downloading. Physical is still  
6 a very important significant factor. Downloading  
7 was becoming a very significant important factor.

8                   And our view was that those two rates  
9 were the ones that were going to matter for the  
10 five-year period that was relevant for Phono I. The  
11 interactive services at that time, we did not  
12 believe were economically significant at that time.  
13 We had obviously no way to judge the rate of their  
14 growth, but we didn't think that that was going to  
15 be economically that important during the five-year  
16 period. That's how I would put it.

17 BY MR. ELKIN:

18               Q. But, nonetheless, you were fighting with  
19 the Services in a protracted trial before you  
20 actually reached an agreement. You had weeks and  
21 weeks of trial testimony followed by weeks and weeks  
22 of rebuttal trial testimony before you got to an  
23 agreement; isn't that correct?

24               A. The timing of the agreement happened  
25 during the proceeding. Sometimes settlement

1 agreements can take a long time. Sometimes they  
2 talk about settlements on the steps of the  
3 courthouse. Sometimes they happen when you're in  
4 the proceeding because both parties have a different  
5 viewpoint than they did before the start of the  
6 proceeding.

7 But, yes, we settled during the  
8 proceeding.

9 JUDGE STRICKLER: Well, if I -- did you  
10 settle towards the end of the proceeding?

11 THE WITNESS: I believe it was -- it was  
12 maybe during the rebuttal phase of the hearing, if I  
13 recall correctly.

14 JUDGE STRICKLER: So you already had the  
15 direct phase and you already had discovery and you  
16 already had all the written direct and written  
17 rebuttal testimony done?

18 THE WITNESS: That's all true. But it  
19 was mostly focused on the Subpart A categories,  
20 because those were what mattered at the time. But,  
21 yes, the --

22 JUDGE STRICKLER: I understand. You  
23 talked a moment ago about how you rationally, you  
24 know, pick your battles and you look at what's  
25 economically significant. If I'm understanding your

1 testimony correctly -- excuse me -- the costs of the  
2 battle with regards to Subpart B in that 2008  
3 proceeding were already sunk, they were gone,  
4 weren't they?

5 THE WITNESS: Oh, no, Judge. It wasn't  
6 about the cost of the proceeding at that time.  
7 Because the Subpart A rates were so dominant in the  
8 marketplace, we were going to experience the cost  
9 whether we settled Subpart B or not, quite honestly.

10 My philosophy of driving the settlement  
11 to get it done was that we believed that because the  
12 Subpart A rates were the ones that mattered to us  
13 economically, we wanted the Court to focus on those,  
14 and not have a lot of these other issues that had  
15 little economic significance cluttering the  
16 decision-making.

17 JUDGE STRICKLER: So to try to benefit  
18 our predecessors?

19 THE WITNESS: We hoped that it would. I  
20 think there's -- there was a risk, for example, not  
21 that this panel would approach it that way, but  
22 sometimes judges like to cut the baby in half. And  
23 so, for example, if, in the judges' mind, they  
24 wanted to give a healthy rate on interactive  
25 streaming and give maybe a lower rate on the Subpart

1 A rates, and that was some kind of a compromise in  
2 their mind, that would have been very bad for us  
3 economically because of the size of the activity.

4 We didn't want that to be something in  
5 play.

6 JUDGE STRICKLER: So there's a strategic  
7 benefit to dichotomizing through settlement?

8 THE WITNESS: It has been my strategic  
9 view from the first trial through this trial. It's  
10 why the two sides flipped this time. It's why we've  
11 now settled Subpart A and are litigating Subpart B,  
12 is because we believe economically in the five-year  
13 period it's the -- it's the streaming rate that will  
14 matter, not the physical or download rate.

15 JUDGE STRICKLER: Thank you.

16 BY MR. ELKIN:

17 Q. Well, in fact, it wasn't just the written  
18 direct and written rebuttal testimony. These were  
19 weeks and weeks of testimony, both through the  
20 direct portion -- back in those days, you didn't  
21 have the direct and rebuttal truncated the way you  
22 have today.

23 A. Correct.

24 Q. So you went through an entire trial of  
25 direct testimony, like we're doing here, and then

1 another trial with respect to the rebuttal  
2 testimony, before you got to any agreement. Isn't  
3 that correct?

4 A. It's correct that the trial structure was  
5 different. It's correct that the sides were in  
6 different order, that we went first in that trial.

7 That's all correct. It doesn't change  
8 one bit our desire to have settled the Subpart B  
9 rate and ultimately to have accomplished that before  
10 decision.

11 Q. Okay. Just a couple more questions with  
12 regard to these proceedings. And, again, I'm going  
13 to defer to my colleagues with regard to delving  
14 into this with a little bit more detail.

15 I want to just harken back to the  
16 inherent value of music concept for a moment. The  
17 -- by the way, the current rate structure under  
18 Subpart B has now been in effect for -- for nearly  
19 ten years, save for that portion of Subpart B that  
20 was tweaked dealing with the "greater of" language  
21 that you testified earlier, correct?

22 A. The basic Subpart B structure has been in  
23 place since the first settlement.

24 Q. Okay. Now, am I correct that in  
25 Phonorecords I, you, David Israelite, and the NMPA,

1 considered the inherent value of music should drive  
2 the determination by the CRB?

3 A. I don't recall whether I used that  
4 language ten years ago or not.

5 Q. Do you recall using it at your deposition  
6 when I asked you about it?

7 A. I don't recall.

8 Q. Let's take a look at your deposition,  
9 which is Amazon Trial Exhibit 328. And there are  
10 two portions that I'll direct your attention to.  
11 One is at page 66, lines 11 to 18, and then -- then  
12 I'll read you another portion in a moment.

13 "Question: Do you remember taking the  
14 position in Phonorecords I that the inherent value  
15 of music should drive the determination by the CRB?

16 "Answer: I don't recall the language we  
17 used ten years ago, but I'm sure that our position  
18 was similar and our viewpoint about it."

19 Do you remember that testimony?

20 A. I don't remember this specific exchange,  
21 but it's -- it's encouraging that it seems to be  
22 exactly what I just said.

23 Q. Okay. Thank you for that.

24 Now, you believe the current  
25 configurations of Subparts B and C should be

1 eliminated because companies like Amazon have  
2 non-music businesses that benefit from the Copyright  
3 Owners that may not be compensable, correct?

4 A. That's one of the many reasons.

5 Q. Okay. Now, am I also correct that the  
6 801(b) factors do not specifically require in your  
7 mind that consideration be given to the non-music or  
8 businesses of the DSPs?

9 A. I disagree with that.

10 Q. And have you -- have you never stated  
11 that you believe it is correct that the 801(b)  
12 factors do not specifically require that  
13 consideration be given to non-music business or  
14 businesses of the DSPs?

15 A. I don't think that the 801(b) factors use  
16 that exact language, but I believe that the concepts  
17 within the 801(b) factors support doing just that.

18 Q. Okay. So you -- so you would agree that  
19 you have -- you agree that the 801(b) factors do not  
20 specifically require consideration?

21 A. The 801(b) --

22 Q. You gave in to the non-music businesses,  
23 correct?

24 A. The 801(b) language is what it is. And  
25 it doesn't include specific references to non-music

1 businesses in the factors, but there are a lot of  
2 things that it doesn't specifically say. It -- it  
3 has concepts in it that I believe support doing just  
4 that.

5 Q. Right. And you agree that in Phono II,  
6 not Phono I, but Phono II, the parties extensively  
7 negotiated how the regs would address the allocation  
8 of the bundled service revenues to specific  
9 offerings constituting the Subpart B and Subpart C  
10 activity?

11 A. We negotiated the language for Phono II's  
12 settlement before it was submitted, yes.

13 MR. ELKIN: Your Honor, I am going to --  
14 with the Court's permission, would like to go into  
15 restricted session.

16 JUDGE BARNETT: Okay. Anyone in the  
17 courtroom who has not signed the nondisclosure  
18 agreement, if you would please wait outside. Do you  
19 think it will go the remaining 15 minutes before the  
20 break, Mr. Elkin?

21 MR. ELKIN: Yes.

22 JUDGE BARNETT: Okay. And you can get a  
23 jump on the lunch line.

24 MR. ZAKARIN: Let me just ask, if I can,  
25 is this going to be restricted going -- with respect



1 to NMPA or to other Services?

2 MR. ELKIN: No, they're fine. They can  
3 remain, if the Court is amenable.

4 JUDGE STRICKLER: "They" meaning NMPA  
5 people?

6 MR. ELKIN: Exactly. It's only going to  
7 be the NMPA's confidential information.

8 JUDGE BARNETT: So the evidence to be  
9 adduced will only relate to NMPA confidential  
10 information. If you're privy to that, you may stay.

11 (Whereupon, the trial proceeded in  
12 confidential session.)

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1 O P E N S E S S I O N

2 AFTERNOON SESSION

3 (1:07 p.m.)

4 JUDGE BARNETT: Please be seated.

5 Ladies and gentlemen, we have been  
6 rolling with the exhibit numbering exercise, and  
7 living on a promise of de-duping after we're done,  
8 which we're going to go with, let me just make sure  
9 you understand when you de-dupe, you are going to  
10 have to give us a key because in our notes we're  
11 going to have different numbers, and in the  
12 transcript there are going to be different numbers,  
13 so we will need a table, a comparison table, so we  
14 know what's what.

15 All right? Thank you. Mr. Elkin, you  
16 are the one?

17 BY MR. ELKIN:

18 Q. Afternoon, panel. Afternoon, Mr.  
19 Israelite.

20 I think before we broke for lunch, we  
21 were reviewing Amazon Trial Exhibit 306, which is --  
22 begins with Bates stamp 1424. I am going to be  
23 moving through other pages of this exhibit, and I  
24 would note, as I'm sure the panel already has  
25 observed, all three pages are 1424.

1                   So I am just going to refer to them as  
2 pages 1, 2, and 3 for purposes of going through the  
3 examination.

4                   JUDGE BARNETT: Thank you. Will this be  
5 open or restricted?

6                   MR. ELKIN: This is going to be -- we're  
7 still continuing, so it is going to be restricted  
8 for now, and hopefully in about ten minutes we can  
9 do the remainder in an open session.

10                  JUDGE BARNETT: Okay. If there is anyone  
11 in the hearing room at this time, who is not  
12 permitted to hear this restricted information,  
13 please wait outside.

14                  (Whereupon, the trial proceeded in  
15 confidential session.)

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1 O P E N S E S S I O N

2 BY MR. ELKIN:

3 Q. Mr. Israelite, I want to focus back on  
4 the mechanicals, just a general discussion, if we  
5 can, now that we're out of the numbers here.

6 A. Am I correct that the mechanical income  
7 has been dropping since long before the resolution  
8 of Phonorecords II?

9 A. We didn't have the same type of data  
10 before the calendar year 2013, but I believe that  
11 mechanicals have been shrinking for a longer period  
12 of time than that, yes.

13 Q. And it has been dropping well before the  
14 resolution of Phonorecords II, right?

15 A. Oh, yes, it dropped significantly during  
16 what we would call kind of the theft period, where  
17 there was a lot of theft of copies. And I believe  
18 it was dropping since that time.

19 Q. It dropped also due to the disaggregation  
20 of the album, right?

21 A. The disaggregation of the album certainly  
22 had an effect, but I wouldn't say that was one of  
23 the major causes of the decline in mechanicals. I  
24 do think it caused some decline in mechanicals.

25 Q. So the notion that individuals --

1 withdrawn.

2                   So the notion that individual tracks were  
3 being consumed by the public as opposed to full  
4 albums had no material effect on the decline of  
5 mechanicals?

6           A.    I don't know how to judge how large of an  
7 effect it had. I think it had some effect. I don't  
8 know to what extent that drove the overall decline.  
9 We didn't have the kind of data points that we do  
10 now back then.

11           Q.    But you wouldn't disagree with me that  
12 the -- the drop-off with respect to mechanicals was  
13 material due to the disaggregation of the album?

14           A.    I don't know if I can say it is material  
15 or not. I don't know how much of it was  
16 attributable to the disaggregation.

17           Q.    Tell me if you agree with me as to the  
18 following: The music publishing industry is  
19 fortunate that we have a bundle of rights that  
20 produce income in different ways. While mechanical  
21 revenue is down significantly, performance income  
22 has mostly been held steady and publishers have  
23 become more aggressive in seeking alternative  
24 revenues from sources such as synchronization,  
25 lyrics, tablature, and merchandising.

1                   Would you agree with that?

2           A.    I don't recall specifically saying or  
3   writing that, but it sounds like something I have  
4   said or written.

5           Q.    Would you agree with that?

6           A.    I do.

7           Q.    Now, I believe that you have testified in  
8   your written direct statement that Internet  
9   streaming was still experimental, in its  
10   experimental stage in Phono I. Is that correct?

11          A.    Which part of my direct statement is  
12   this?

13          Q.    Let's take a look at paragraph 81.

14          A.    81?

15          Q.    Yes.

16          A.    Okay.

17          Q.    It is page 30. "When the current  
18   statutory rates and rate structure were negotiated,  
19   interactive streaming was in its experimental  
20   phase."

21          A.    Yes.

22          Q.    So you agree with that, right?

23          A.    Yes.

24          Q.    You wrote it. And that proceeding  
25   occurred nearly ten years ago, right, as to the

1 Subpart B rates?

2 A. I believe it started more than 11 years  
3 ago but, yes, it was approximately ten years is when  
4 it was settled.

5 Q. And as I mentioned earlier, other lawyers  
6 are probably going to question you about that. But  
7 you testified that -- in your written direct  
8 statement that the parties in Phono II arrived on  
9 the scene to make a quick settlement, right?

10 A. That the parties arrived on the scene to  
11 make a quick settlement?

12 Q. Yeah, when Phono II came around, that the  
13 parties were ready to -- they were ready to make a  
14 quick settlement. Do you remember that?

15 A. I think that it was clear very early that  
16 all of the parties thought it might be best to try  
17 to settle and not go through another trial so soon  
18 after the last one.

19 Q. Well, let me just -- look at page 35 of  
20 your written direct testimony, paragraph 100.  
21 That's Amazon Trial Exhibit 329.

22 "So for these reasons, the parties to  
23 Phonorecords II came prepared to quickly negotiate a  
24 settlement and were able to do so in the proceedings  
25 without the need to file a written direct statement,

1 take any discovery, or engage in any hearings."

2 Right? That's accurate, right?

3 A. Yes. We -- it reminds me, again, that I  
4 split my infinitive here, but yes.

5 Q. Okay. No harm, no foul.

6 So now you further testified --  
7 withdrawn.

8 Is it your belief that none of the  
9 participants here, save for Spotify, had launched  
10 any interactive streaming services by the time of  
11 Phono II?

12 A. I don't recall any of the parties here in  
13 this proceeding operating interactive streaming at  
14 that time. I believe at some point during the  
15 proceeding Spotify entered the United States, but  
16 they weren't a party to the proceeding nor do I  
17 believe were they a member of DiMA.

18 But I don't recall the other four  
19 engaging in interactive streaming at that time, no.

20 Q. Right. And Spotify launched in the U.S.  
21 in 2011, right?

22 A. I don't remember exactly when they  
23 launched, but I believe it was sometime during that  
24 entire process of Phono II.

25 Q. Now, just with respect to the proceeding



1   itself, it is true, is it not, that the negotiation  
2   related to Phono II took a year to negotiate; is  
3   that correct?

4           A.   I don't remember the entire length from  
5   start to conclusion, but I have no reason to  
6   disagree with the time period of -- it may have been  
7   a year.

8           Q.   In fact, you represented to Congress that  
9   it took a year for that negotiation to take place,  
10   right?

11          A.   If I did, I'm sure it was fresh in my  
12   memory when I said that to Congress. Right now  
13   sitting here, it is not fresh in my memory how long  
14   the process took, but I have no reason to dispute it  
15   took a year. I just don't remember.

16          Q.   I will refresh your memory in a moment.  
17   And would you agree with me that there were 25  
18   parties to that negotiation?

19          A.   I don't think that's accurate. I think  
20   that DiMA had several members that were not  
21   participants in the negotiation, but that ultimately  
22   were included in the settlement, but I don't think  
23   they participated in the negotiation, no.

24          Q.   So do you deny that 25 parties were  
25   involved in Phonorecords II?

1           A.    Well, I think it is just the extent of  
2   how they were involved and when they were involved.  
3   And so ultimately I believe all of the DiMA  
4   membership had to sign on to the settlement, but  
5   that doesn't mean they were involved in the process  
6   itself.

7                   But my recollection is there were quite a  
8   few parties at the end that had to come together for  
9   the purpose of a final settlement to avoid the  
10   trial.

11           Q.    Do you remember providing congressional  
12   testimony in 2012 that the negotiation for  
13   Phonorecords II took an entire year and involved 25  
14   parties?

15           A.    I don't remember that specific phrase,  
16   but, again, I have no reason to dispute it took a  
17   year. And it may have involved 25 parties signing  
18   the settlement, but I don't think that many were  
19   involved in the process itself.

20           Q.    All right. Well, just to be fair to you,  
21   let's take a look to refresh your memory at Amazon  
22   Trial Exhibit 337.

23           A.    337, okay.

24           Q.    337 for identification is a printout from  
25   the NewsRoom reflecting a congressional hearing that

1 took place on June 6th, 2012.

2 A. It was June 8th, I believe.

3 Q. Well, it says June 8th at the top.

4 A. I'm sorry.

5 Q. If you take a look three lines down, it  
6 says June 6th, 2012.

7 A. Got it.

8 Q. And then if you skip your eye down, more  
9 than 70 percent down on the page, you will see your  
10 name there. And I am going to point to where in the  
11 transcript in a moment, after I have it introduced  
12 as an exhibit, but before I do that, would you tell  
13 me this is the -- you testified at a hearing before  
14 the House Committee on Energy and Commerce,  
15 Subcommittee on Communications and Technology, on  
16 the future of audio on or about June 6th, 2012?

17 A. Yes.

18 Q. And let me just call to your attention  
19 page 19, and I am going to introduce this.

20 MR. ZAKARIN: Page 9?

21 BY MR. ELKIN:

22 Q. Page 9 -- no, page 8. So is this the  
23 testimony that you provided to Congress on that  
24 date, June 6th, 2012?

25 A. It appears to be, yes.

1 MR. ELKIN: Your Honor, I move into  
2 evidence Amazon Trial Exhibit 337.

3 MR. ZAKARIN: No objection.

4 JUDGE BARNETT: 337 is admitted.

5 (Amazon Exhibit Number 337 was marked and  
6 received into evidence.)

7 BY MR. ELKIN:

8 Q. Let me direct your attention to page 9.  
9 The eighth line down, the eighth paragraph down, I  
10 apologize, and I will read the first -- I will just  
11 read this paragraph quickly. "Just a few months  
12 ago, 25 parties completed a year-long negotiation  
13 over rates for five new categories of music services  
14 to allow flexibility in creating new services that  
15 enable consumers to access and use and purchase  
16 music in previously impossible ways. These new  
17 categories allow consumers to enjoy and access their  
18 own music across every electronic device. And  
19 parties representing digital services, record  
20 labels, and songwriters and publishers are currently  
21 involved in discussions on how to work together to  
22 improve our licensing system."

23 Was that an accurate testimony that you  
24 -- withdrawn.

25 Is this testimony that you provided to

1 Congress on June 6th, 2012?

2 A. I don't recall saying it, but I have no  
3 reason to think it is not.

4 Q. And was this truthful and accurate at the  
5 time that you provided this testimony?

6 A. I believe so, yes.

7 Q. Now, you are aware, are you not, that  
8 during the Phonorecords II negotiations that my  
9 client, Amazon, undertook its investments in locker  
10 services, correct?

11 A. That --

12 Q. That eventually became -- that eventually  
13 fell into the category of Subpart C, correct?

14 A. I don't recall the timing of when they  
15 launched that, but I recall that the company did  
16 have an interest in that category, yes.

17 Q. And Google participated as well in  
18 Phonorecords II, correct?

19 A. Oh, yes, they were very concerned about  
20 Subpart A.

21 Q. And the same with Pandora, they were a  
22 participant?

23 A. I don't recall Pandora participating.  
24 They were a very active member of DiMA, but I don't  
25 recall their direct participation in Phono II.

1 Q. Well, if I were to show you the docket  
2 sheet that would reflect the petitions submitted and  
3 Pandora is on there, would that refresh your  
4 recollection?

5 A. If I remember correctly, they filed as a  
6 party. We were preparing to file a motion to  
7 exclude them as not properly being an interested  
8 party because they weren't operating any Section  
9 115-type services, but then we ended up settling  
10 before we filed that motion, if I remember  
11 correctly.

12 Q. So I just want to make sure -- let me  
13 start over.

14 Do you know, was Pandora a participant in  
15 Phonorecords II?

16 A. They may have filed as an initial party.  
17 I'm sorry, I thought you were asking me about the  
18 negotiation on the settlement, if I misunderstood,  
19 they may have filed as a party for Phono II.

20 Q. And Apple also was a participant in  
21 Phonorecords II, right?

22 A. Oh, yes, they were the dominant provider  
23 of downloads in Subpart A.

24 Q. So both Apple, Pandora, Amazon, and  
25 Google were all participants in Phonorecords II and

1 Spotify, who was not a participant, had launched  
2 during the period of time that Phonorecords was  
3 pending, correct?

4 A. Yes, Amazon, Apple, Google, Pandora were  
5 all participants and members of DiMA, I believe.  
6 They were not active in the Subpart B categories,  
7 but they were participants, I believe mostly for the  
8 Subpart A categories.

9 And Spotify, as I previously testified, I  
10 believe had some -- it may have been an experimental  
11 or a trial, but some type of launch in the U.S., I  
12 believe, during the proceeding, but they were not a  
13 party or a member of DiMA, if I remember correctly.

14 Q. Now, you believe that the current rate  
15 structure agreed to by the Copyright Owners in  
16 Subparts B and C in Phonorecords II should be  
17 disregarded because at the time these rates were  
18 set, on-demand streaming was in its experimental  
19 phase; is that correct?

20 A. Well, I think they should be disregarded  
21 for several reasons, one of which is all the parties  
22 agreed that's what would happen, but I also think it  
23 is true that our view about those categories was  
24 very much shaped by the fact that they were in an  
25 experimental phase, did not represent a significant

1 amount of revenue, and, therefore, we were -- we  
2 were experimenting with how to best try to figure  
3 out how to make them work.

4 Q. Okay. And my question, let me try to ask  
5 my question again.

6 Is it your view that the rate structure  
7 agreed to in Phonorecords II should be disregarded  
8 because on-demand streaming at that point was still  
9 in its experimental phase?

10 A. That's one reason, yes.

11 Q. Now, would you agree with me that if  
12 Amazon exited the on-demand streaming space after  
13 the results in this proceeding, that that business  
14 could be characterized as experimental?

15 A. I don't think that at this point if  
16 Amazon were to exit it would really be experimental.  
17 They had been running a streaming service for some  
18 time. They have now started running a different  
19 type of streaming service. But it would not be  
20 experimental in the same way.

21 It would certainly be early in the life  
22 of the full service Amazon service, but I wouldn't  
23 call it the same type of experimental exercise as we  
24 did for what was going on back in Phono II.

25 JUDGE STRICKLER: I'm sorry, when you say



1 "experimental," what do you mean?

2 THE WITNESS: I think experimental  
3 captures several things. First of all, I think when  
4 we say it was experimental in Phono II, I think it  
5 means that we didn't have a great deal of data to  
6 rely upon when discussing rate structures.

7 I think, Number 2, we say it was  
8 experimental because it had not yet been widely  
9 adopted by consumers as a preferred method of access  
10 of music or use of music. And so it was  
11 experimental in that way too.

12 JUDGE STRICKLER: Thank you.

13 BY MR. ELKIN:

14 Q. Well, let me go back to, if I could, the  
15 thread that I was on just a moment ago. Do you deny  
16 that if Amazon has relatively recently launched  
17 their full service interactive streaming services,  
18 they would -- and they would exit, following the  
19 rates here, they would be considered to be -- that  
20 service would have been considered to be  
21 experimental?

22 MR. ZAKARIN: Asked and answered.

23 MR. ELKIN: No. I am actually impeaching  
24 him now.

25 THE WITNESS: No. Again, I think it is a

1 different kind of experimental, when we say  
2 experimental, I wouldn't call it experimental. And  
3 it is for the same two reasons I gave Judge  
4 Strickler.

5 First of all, it's -- the data that is  
6 available about interactive streaming is much more  
7 developed today, both -- mostly from other Services  
8 that run similar type services. And, secondly, it  
9 is becoming the dominant form of consumer use.

10 And so for those two reasons, I wouldn't  
11 think that what Amazon has done is -- would be  
12 experimental, if they were to exit at this point.

13 BY MR. ELKIN:

14 Q. Thank you, Mr. Israelite. Take a look at  
15 Amazon Trial Exhibit 328, pages 188 to 189.

16 A. I'm sorry, 328?

17 Q. 328, pages 188 to 189. Tell me when you  
18 are there.

19 JUDGE STRICKLER: This is in the cross  
20 book again?

21 MR. ELKIN: Yes, it is cross.

22 JUDGE STRICKLER: The pages, I'm sorry?

23 MR. ELKIN: Pages 188 and 189, lines 12  
24 to 25 on 188 and lines 2 to 16 on 189.

25 BY MR. ELKIN:

1           Q.    Tell me whether or not this -- your  
2 answer to my question that I am about to read to you  
3 was what you gave at your deposition.

4                   "Question:  And if the participants in  
5 this proceeding are not participants in Phonorecords  
6 IV, would you consider their services to be  
7 experimental as well?

8                   "Answer:  Well, they might be.  So  
9 Pandora, which is a participant, has not yet  
10 launched their service.  If they launched it and a  
11 couple of months later said this isn't really  
12 working for us and pulled the plug, I would very  
13 much think that that was an experimental service  
14 that they launched.

15                   "Amazon has relatively recently launched  
16 their full service interactive streaming service.  
17 The same would be true with them.  We don't know how  
18 long that would be the case.

19                   "Apple, which mostly had been in the  
20 business in the music space of selling downloads, I  
21 guess its experience with music has recently offered  
22 an interactive streaming service.  And if they  
23 didn't stick with it, then it might be that Apple  
24 was experimental with it.

25                   "So I do think that the length of time

1 that a company commits to doing it has some  
2 influence on whether we think it is experimental."

3 Was that the answer that you gave to my  
4 question at your deposition?

5 A. Oh, yes.

6 Q. Thank you. Now, Microsoft, in fact, has  
7 exited the streaming business, right?

8 A. I don't know whether existing customers  
9 are still able to use their service or not, but they  
10 are not active in it any more.

11 Q. You think it has been discontinued,  
12 right?

13 A. Yeah, I don't think a new customer could  
14 join it, but I just don't know whether existing  
15 customers are being serviced still or not.

16 Q. So it has been discontinued, right?

17 A. I think I just said that, yes.

18 Q. Okay. And you know that Yahoo actually  
19 exited the space, right?

20 A. I believe that's true, yes.

21 Q. Now, Mr. Israelite, you have referred to  
22 the digital service providers as "dumb pipes,"  
23 correct?

24 A. I may have referred to them as that  
25 before, yes.

1 Q. But, in fact, you have heralded these  
2 Digital Services as important partners in your  
3 business, correct?

4 A. I think they are important partners, yes.

5 Q. And you believe that they have helped the  
6 industry to stem the flow of piracy, correct?

7 A. Yes, they have played a positive role in  
8 that.

9 Q. And you believe that the services -- that  
10 the on-demand streaming services that are provided  
11 have increased the availability of existing works  
12 and the overall volume of works, correct?

13 A. Oh, there is no doubt that they have  
14 increased the availability of works, just by virtue  
15 of if you have 40 million songs in a library, it is  
16 certainly more accessible than if you were to try to  
17 find a physical version of those 40 million songs,  
18 no question.

19 Q. Okay.

20 MR. ELKIN: Thank you, Mr. Israelite.  
21 Panel, I have no further questions.

22 JUDGE BARNETT: Mr. Steinthal, I see you  
23 moving around. Are you going to cross-examine this  
24 witness?

25 MR. STEINTHAL: Yes, I will, Your Honor.

1 We're working with the same binder.

2 JUDGE BARNETT: Way to go.

3 CROSS-EXAMINATION

4 BY MR. STEINTHAL:

5 Q. Good afternoon, Mr. Israelite.

6 A. Good afternoon.

7 JUDGE BARNETT: And are we okay in open  
8 session?

9 MR. STEINTHAL: Open session, yes.

10 JUDGE BARNETT: Thank you.

11 BY MR. STEINTHAL:

12 Q. Now, you have testified that when the  
13 parties entered into the 2008 Phonorecords I  
14 settlement, they specifically negotiated that it  
15 would be non-precedential, correct?

16 A. I remember language to that effect, yes.

17 Q. And you said there was a separate  
18 settlement agreement that you referred to as a  
19 wrapper agreement that contained that part of the  
20 agreement?

21 A. I don't know that I called it a wrapper  
22 agreement, but I believe my counsel did. And I know  
23 it as a wrapper or a wrap agreement, yes.

24 Q. And do you contend that the provision on  
25 non-precedential effect is separate from the de novo

1 language in the regulations that Judge Strickler  
2 asked you about yesterday, correct?

3 A. I think it was an extension of that. I  
4 think it was the same thing, and I was asked why  
5 just the de novo language made it into the  
6 regulation versus the full language. And I don't  
7 know the answer to that but it was all the same  
8 thing.

9 It was an agreement of the parties that  
10 it would be non-precedential. And whatever ended up  
11 in the regulation, I guess, was the de novo  
12 language.

13 Q. You don't dispute the fact that there is  
14 nothing in the regulations that says anything about  
15 non-precedential terms, correct? It says de novo.  
16 It doesn't say that the settlement was a  
17 non-precedential, correct?

18 A. I am honestly not that familiar with the  
19 regulations to know.

20 Q. Now, there was a separate settlement  
21 agreement among the parties surrounding the  
22 Phonorecords II settlement, was there not?

23 A. Yes.

24 Q. By the way, have you spoken to your  
25 counsel about that agreement embodying the

1 Phonorecords II settlement since the topic came up  
2 this morning?

3 MR. ZAKARIN: Why isn't that privileged,  
4 assuming that it occurred?

5 MR. STEINTHAL: I don't believe it should  
6 have been the subject of discussion since the topic  
7 came up this morning.

8 MR. ZAKARIN: Nobody said that it was,  
9 but it is privileged.

10 JUDGE BARNETT: Sustained.

11 BY MR. STEINTHAL:

12 Q. Now, in the settlement agreement that  
13 embodied the Phonorecords II settlement, there is no  
14 language to the effect that the rates and terms that  
15 the parties agreed to were non-precedential or  
16 experimental, correct?

17 A. I think the language in Phonorecords I  
18 covered all future proceedings. So there would have  
19 been no need to restate it, if I remember it  
20 correctly.

21 Q. Let's -- let's clarify this then, okay?  
22 Let's take a look at the actual settlement agreement  
23 between the parties that embodied the settlement of  
24 the Phonorecords II proceeding. Let's mark this as  
25 Impeachment Exhibit -- what number are we up to --



1 JUDGE BARNETT: 13.

2 MR. ZAKARIN: Your Honor, I understood  
3 this morning that if one of them was going to go in,  
4 whether it be 208 or 2012, they should both be going  
5 in. And Mr. Steinthal is now putting in 2012. I am  
6 happy to have 2008 go in with it as part of it.

7 MR. STEINTHAL: I have no problem with  
8 that.

9 JUDGE BARNETT: That's fine. Do we have  
10 the 2008 agreement available to make the copies to  
11 include with this exhibit?

12 MR. ZAKARIN: I even have copies, which  
13 is --

14 JUDGE BARNETT: Okay.

15 MR. ZAKARIN: -- highly organized of me.

16 JUDGE STRICKLER: 2012 was just being  
17 offered for impeachment purposes. Counsel now agree  
18 it should go in --

19 MR. STEINTHAL: I am happy to have it go  
20 into evidence.

21 MR. ZAKARIN: I am happy to have them  
22 both in.

23 JUDGE BARNETT: Okay, thank you. I  
24 believe, Ms. Whittle, it is 6013?

25 THE CLERK: That's right.

1 JUDGE BARNETT: So these two agreements  
2 together are Exhibit 6013.

3 JUDGE FEDER: They are going in as the  
4 same exhibit?

5 JUDGE BARNETT: They are going in as one.

6 MR. MANCINI: Your Honor, it may be  
7 beneficial if we had marked them as separate  
8 exhibits.

9 JUDGE BARNETT: We aim to please. '08  
10 will be 6013. '12 will be 6014.

11 MR. MANCINI: Thank you, Your Honor.

12 (Google Exhibit Numbers 6013 and 6014  
13 were marked and received into evidence.)

14 MR. STEINTHAL: You say '08 is 13?

15 JUDGE BARNETT: '08 is 13. '12 is 14. I  
16 meant to say it in chronological order. '08 is  
17 6013. '12 is 6014.

18 MR. STEINTHAL: That's what I understood  
19 you to say.

20 THE WITNESS: I am not going to need this  
21 for the moment?

22 BY MR. STEINTHAL:

23 Q. You can put it aside for now. Can I get  
24 a copy of the '08 agreement? Thank you. Is  
25 Exhibit 6014 the settlement agreement embodying the

1 parties' agreement on rates and terms to resolve the  
2 Phonorecords II proceeding?

3 A. That's what this appears to be, yes.

4 Q. And that's your signature on one of the  
5 several pages of signatures which were done in  
6 separate configurations, but if you look at page 4  
7 on the third page of the signatures, that's your  
8 signature, right?

9 A. Yes.

10 Q. Can you point us to any place in this  
11 agreement, Mr. Israelite, containing language to the  
12 effect that the agreed-upon rates and terms were  
13 experimental or non-precedential?

14 JUDGE STRICKLER: In the 2008 --

15 MR. STEINTHAL: No, the 2012 agreement,  
16 Exhibit 6014.

17 JUDGE STRICKLER: Thank you.

18 BY MR. STEINTHAL:

19 Q. Can you point me to any place in this  
20 agreement containing language to the effect that the  
21 agreed-upon rates and terms were experimental or  
22 non-precedential?

23 A. I will have to look. I haven't reviewed  
24 this document for some time. Let me --

25 JUDGE BARNETT: Not to muddle the waters

1 further, but 6014, the copy that I have, has no  
2 signatures in the -- on the counterpart pages. The  
3 signature is on the smaller of the two agreements,  
4 6013, which I believe is --

5 MR. STEINTHAL: If that's the case, Your  
6 Honor, then it was a mistake. The one I am looking  
7 at has signatures on every page.

8 MR. ZAKARIN: Mine does too. I have  
9 signatures on both, actually. Maybe you are looking  
10 at the form of motion, which was just an attachment.

11 MR. STEINTHAL: The Exhibit 6014, to be  
12 clear, Your Honor, is a four-page agreement, which  
13 has certain attachments to it. The fourth page is  
14 reproduced several times with a signature line  
15 showing a signature. And then we have the exhibits  
16 to the agreement, which include a form of motion to  
17 adopt the settlement.

18 JUDGE STRICKLER: That's what has no  
19 signatures?

20 MR. STEINTHAL: That is what has no  
21 signatures, because that's a form of motion. There  
22 is a formal motion that was filed thereafter that is  
23 signed.

24 JUDGE BARNETT: Thank you.

25 BY MR. STEINTHAL:

1           Q.    So perhaps, Mr. Israelite, you have used  
2   that opportunity to see whether you could point us  
3   anywhere in this agreement to a place that has  
4   language to the effect that the agreed-upon rates  
5   and terms were experimental or non-precedential?

6           A.    I haven't yet located where the de novo  
7   language existed, if it is in this document at all,  
8   but that's my recollection from the second Phono II  
9   settlement is that there was also the -- that it  
10   would not -- that any future rate proceeding would  
11   be de novo.

12                   And it was in the first settlement that I  
13   recalled that there was specific language that what  
14   was agreed to in the first settlement, the Subpart B  
15   rates, could never in any future proceeding be used.  
16   That was my recollection.

17           Q.    So you don't dispute the fact that there  
18   is nothing in Exhibit 6014 that addresses any  
19   agreement by the parties that the rates and terms  
20   agreed upon were non-precedential or experimental,  
21   correct?

22           A.    I do not see any restatement of the  
23   language from the first settlement, which obviously  
24   carried through in perpetuity, but I do not see that  
25   in this agreement.

1 Q. You say it obviously carried in  
2 perpetuity.

3 A. That's my opinion, yes.

4 Q. Okay. That's your opinion. We will get  
5 to that other agreement in a minute.

6 Are you familiar with a term that is used  
7 by parties in contracts called an integration  
8 clause?

9 A. I think you are stretching the 20 years  
10 it has been since I practiced law. I don't recall  
11 that phrase.

12 Q. Take a look at page 3 of the agreement,  
13 Exhibit 6014, paragraph 5.5. It states "Entire  
14 Agreement: This agreement expresses the entire  
15 understanding of the parties concerning the subject  
16 matter hereof and supersedes all prior and  
17 contemporaneous agreements and undertakings of the  
18 parties with respect to the subject matter hereof."

19 That was part of the agreed-upon contract  
20 between the parties, correct?

21 A. Yes, I see that as the 5.5 language.

22 JUDGE STRICKLER: I think we understand,  
23 and correct me if I am wrong, that the 2012  
24 regulations include de novo language that don't  
25 include any further language along the lines that we

1 have been discussing, correct?

2 THE WITNESS: I honestly don't -- wasn't  
3 involved in the difference between the contractual  
4 agreements and any submitted regulation language,  
5 but...

6 JUDGE STRICKLER: What I am trying to get  
7 to is do you know if there is anything in the 2012,  
8 6014 in front of you, that makes reference to the de  
9 novo provisions?

10 THE WITNESS: I haven't seen that  
11 language in that document, no.

12 JUDGE STRICKLER: Thank you.

13 BY MR. STEINTHAL:

14 Q. So let's take a look at Exhibit 6013  
15 then, which is the 2008 settlement agreement. Let's  
16 make sure this is the 2008 agreement.

17 Is your understanding correct, this is  
18 the settlement agreement embodying the rates and  
19 terms of the 2008 Phonorecords I proceeding?

20 A. That's what this appears to be, yes.

21 Q. And it bears your signature on page 8?

22 A. Yes.

23 Q. Let's take a look at paragraph 3. Is  
24 this the non-precedential language that you recall  
25 the parties agreed upon for purposes of settling the

1 Phonorecords I case?

2 A. Let me read this paragraph. Yeah, I  
3 believe this is the language I was recalling.

4 Q. So do I understand it then that the NMPA  
5 and the publishers knew how to draft and embody a  
6 provision that expressed any agreement between the  
7 parties that the terms were non-precedential and  
8 experimental, but they knew how to do that in 2008  
9 and they didn't know how to do that in 2012?

10 A. I don't know how to answer what my  
11 attorneys both inside NMPA and outside counsel knew  
12 or thought at the time.

13 Q. Okay.

14 A. My understanding was that when the  
15 agreement was made in 2008, that there was an  
16 agreement among the parties that what we were  
17 agreeing to would never be used in a future rate  
18 proceeding. That was the level of my understanding  
19 of what we had agreed to as the parties.

20 Q. That the 2008 agreement would never be  
21 used as a precedent in a future proceeding, correct?

22 A. Yes, the 2008 agreement.

23 Q. Thank you. Now, Mr. Israelite, I believe  
24 you testified yesterday that the reason Copyright  
25 Owners have proposed a per-user royalty, in addition



1 to introducing a per-play royalty, is because you  
2 believe Copyright Owners should be compensated under  
3 the Section 115 license, even when a Services's  
4 users do not stream Copyright Owners' works at all  
5 in a given month, correct?

6 A. If it is the availability of our songs  
7 which causes the economic transaction to happen for  
8 the Service, then, yes, I would believe it would be  
9 appropriate and fair for the songwriters and  
10 publishers to share in that economic activity, even  
11 when there is no streaming involved.

12 Q. So the answer is yes, you believe that  
13 even if a user of a service never streams a song in  
14 a given month or year, that you should be  
15 compensated for the access that the user obtains by  
16 paying a subscription fee? That's right, isn't it?

17 A. Well, I think my answer was attempting to  
18 be more careful in that I was specifically saying  
19 that if the economic activity for the Service is due  
20 to the availability of the music and that's why they  
21 are engaged in the economic activity then, yes, I  
22 believe that we would be entitled to share in that.

23 Q. Mr. Israelite, I think my question was  
24 capable of a yes-or-no answer. I don't think  
25 anybody knows why a consumer does X or Y.

1           My question simply, whether it is your  
2 position that even if a consumer never accesses a  
3 song in a given month or a given year, the NMPA or  
4 the Copyright Owners should nonetheless be paid,  
5 correct?

6           MR. ZAKARIN: Objection, object to the  
7 preface where Mr. Steinthal -- I am returning the  
8 favor from before -- announced why consumers do or  
9 don't do things, unnecessary to the question.

10          JUDGE BARNETT: Sustained.

11          THE WITNESS: I don't think it is a  
12 yes-or-no answer because I think the distinction  
13 that I am drawing is an important one.

14          Let me say it a different way. If a  
15 consumer is paying a monthly fee to have access to  
16 just a music service, and they don't use that music  
17 service, but they pay the monthly fee, in that  
18 circumstance I do believe the answer would be yes to  
19 your question.

20          There are other circumstances, for  
21 example, the situation with Amazon and the Prime  
22 membership, you may buy a Prime membership for many  
23 reasons, a music service may be one thing available  
24 to you, but there may be other reasons why you have  
25 entered into the economic transaction.

1           And in that circumstance, I think it is a  
2 different circumstance, which is why I don't feel  
3 comfortable giving a blanket yes or no to your  
4 question is because I think it is important that I  
5 believe our proposal attempts to distinguish the  
6 economic transaction and the purpose thereof.

7 BY MR. STEINTHAL:

8           Q.   Your proposal is for the greater of a  
9 certain \$1.06 per subscriber or .0015 dollars per  
10 stream, correct?

11          A.   I think we use the term "per user" as  
12 opposed to "subscriber." And I think even I have  
13 made the mistake of interchanging the word, but I  
14 believe if you say user and, yes, it is the greater  
15 of those two is our proposal.

16          Q.   So let's just make it easy. Let's take  
17 the Google Play Music service where the subscriber  
18 is paying a subscription fee, a certain amount per  
19 month, the copyright owner position, is it not, is  
20 that they should be paid the greater of a certain  
21 \$1.06 per sub or .0015 cents per stream and that the  
22 Copyright Owners should be paid even if the  
23 subscriber doesn't access one play of music in a  
24 given month, correct?

25          A.   Yes, in the Google Play example, that

1 would be -- my answer would be yes.

2 Q. Now, under the Section 115 license,  
3 however, the owner of a composition has never  
4 received payment from on-demand streaming services  
5 for access alone during a reporting period in the  
6 absence of any stream, correct?

7 A. I don't believe that's correct.

8 Q. Well, you are familiar, are you not, with  
9 the provisions of the regs whereby the allocation of  
10 the actual royalties collected is of a royalty pool  
11 which seeks to determine what particular owners are  
12 going to collect the royalty, right?

13 A. I am not familiar with the regulation,  
14 but I will try to answer any question you have about  
15 it.

16 Q. Well, let's then take a look at 37 CFR  
17 Section 385. I think we need the regs. And this  
18 will also enable us, perhaps, to look at the de novo  
19 language as well.

20 JUDGE STRICKLER: Before we get into  
21 that, while we have a pause, taking a look at  
22 Exhibit 6013, which is the 2008 settlement, which  
23 counsel provided us with a copy of that one? I know  
24 it came from different counsel.

25 MR. ZAKARIN: It came from us, Your

1 Honor.

2 JUDGE STRICKLER: The document you gave  
3 us makes reference to an Exhibit A.

4 MR. ZAKARIN: A is incomplete. We're  
5 looking for the parts of it. Also B was, in fact,  
6 the regulations. And so we didn't attach it because  
7 the regulations are the regulations, but we're  
8 looking for the -- for that attachment. We wanted  
9 to put in the agreement itself.

10 The A is, I think, the same basic motion  
11 that you saw in 2012. You have the front page of it  
12 only.

13 JUDGE STRICKLER: Yes. It would be  
14 preferable to at least have a complete document.

15 MR. ZAKARIN: I agree.

16 JUDGE STRICKLER: And you are  
17 representing, and maybe the parties can stipulate in  
18 that case with regard to the proposed regulations in  
19 the settlement that were attached as an exhibit to  
20 the 2008 agreement, in fact, were the same verbatim  
21 as the regulations that were ultimately adopted. If  
22 you stipulate to that, then we have them right here.

23 But if you can't stipulate to that, then  
24 we should be able to see it so we have a complete  
25 document.

1 MR. ZAKARIN: We will go back and check  
2 to see if we have a more complete document. I  
3 suspect Mr. Steinthal does have a complete document  
4 as well. So if there is any inconsistency. By the  
5 way, I would get up, but it is hard to get out of  
6 this chair.

7 JUDGE BARNETT: We're going to fix that  
8 table arrangement.

9 MR. ZAKARIN: I don't think it is the  
10 table. There is wires underneath which block my  
11 movement a little bit.

12 JUDGE BARNETT: Well, there is also a  
13 very tiny alleyway there. So we will fix that.

14 MR. ZAKARIN: As a matter of conceit, I  
15 like the tiny alleyway, but the rest of it is more  
16 troublesome.

17 JUDGE STRICKLER: So the 6014,  
18 Exhibit 6014, the 2012 settlement, it appears as  
19 though it is complete, and that came from --

20 MR. STEINTHAL: That came from us.  
21 That's the way it was filed. My recollection is  
22 that's the way the motion was filed. And I believe  
23 it was adopted substantially identical. I can't say  
24 that there weren't --

25 JUDGE STRICKLER: Well, it may or may not

1 be. Exhibit A was the motion and that looks to be  
2 complete. Exhibit B is a press release, I believe,  
3 and that appears to be complete.

4 MR. STEINTHAL: Right.

5 JUDGE STRICKLER: Was there an exhibit  
6 even that had those?

7 MR. STEINTHAL: Yeah. We can -- that's  
8 not part of that agreement. The motion to adopt  
9 attached the regulations.

10 JUDGE STRICKLER: So it is sort of  
11 bootstrapped in as part of the document. So we  
12 should get that too or a stipulation that it is  
13 identical to what we adopted.

14 MR. ZAKARIN: I'm sure Mr. Steintal and  
15 I can work that one out, so the Court has complete  
16 documents.

17 BY MR. STEINTHAL:

18 Q. Mr. Israelite, I was asking you about the  
19 way the royalty pool under the statutory license is  
20 actually distributed. And if you look at Section  
21 385-12, you will see there is a provision called  
22 calculation of royalty payments in general.

23 A. 385 --

24 Q. 12.

25 A. How do I find 12?

1 Q. It is on page 67943.

2 JUDGE STRICKLER: Page numbers in the  
3 upper right-hand corner.

4 THE WITNESS: Okay.

5 BY MR. STEINTHAL:

6 Q. You will see there is a process whereby,  
7 you know, you calculate the greater of the 10 and a  
8 half percent of revenue or the lesser of two things,  
9 the 80 cents per sub and the TCCI provision, but  
10 then there is another process where you allocate the  
11 payable royalty pool and it gets distributed based  
12 on the actual plays that the Services report? Is  
13 this news to you?

14 A. I'm not familiar with the language in the  
15 Federal Register.

16 Q. Is it news to you as a practical matter  
17 that the way the Section 115 Subpart B license works  
18 under the existing system is you go through a few  
19 steps, and I am going to ask you step-by-step  
20 whether you understand it.

21 Step 1, you calculate the greater of 10  
22 and a half percent of revenue or the lesser of 80  
23 cents per sub or the TCC percentage, right? Are you  
24 with me so far?

25 A. Well, you must be talking only about one



1 of the five categories of Subpart B then, because  
2 the 80 cent number differs --

3 Q. Let's take the portable subscription  
4 service.

5 A. Okay. So the third category of the  
6 Subpart B?

7 Q. Yes.

8 A. Okay.

9 Q. Are you with me now? That's correct.  
10 You agree that that's the first step?

11 A. Is identifying the right category? Yeah,  
12 I agree that's the first step.

13 Q. No. The first step in calculating the  
14 fees to be paid, Mr. Israelite, to be fair, is you  
15 look at 10 and a half percent of revenue or the  
16 lesser of the TCCI payment and the 80 cents per sub  
17 and that determines how much the Service has to pay,  
18 ultimately subject to a floor payment of 50 cents  
19 per subscriber, right?

20 A. Yes, I believe those are the right  
21 numbers from that category.

22 Q. But isn't it true that the statute has a  
23 provision that addresses how the money actually gets  
24 allocated to Copyright Owners?

25 A. Yes. I am not intimately familiar with

1 the language of it, but I understand as a concept  
2 that that process occurs for the payment to be made.

3 Q. And do you understand that the process is  
4 such that the money only goes to the actual  
5 Copyright Owners based on actual plays, not based on  
6 access, but based on actual plays during the  
7 reporting period?

8 A. Yes, but --

9 Q. Yes. We don't need a "but."

10 A. If there are no plays, you would still  
11 have a payment due, if there were no plays, but you  
12 wouldn't be able to use that formula.

13 Q. That the Service would make the payment  
14 based on the formula, but the Copyright Owner, who  
15 would get the benefit of the payment, if that  
16 Copyright Owner had no plays, that Copyright Owner  
17 would get no payments, right?

18 A. No, I'm saying if there were no plays at  
19 all, they would still have the 50 cent mechanical  
20 floor per subscriber, even if there had been zero  
21 plays.

22 Q. I am talking about how the money is  
23 distributed.

24 A. Yes, but there must be plays for that to  
25 be -- I'm sorry. Go ahead.

1           Q.    You agree with the proposition that  
2   however you calculate the amount of money that gets  
3   paid by the Services, it goes into a pool. And the  
4   pool is distributed for any reporting period only to  
5   those Copyright Owners whose works have been played?  
6   Yes or no?

7           A.    No, because philosophically if there had  
8   been zero plays for any customer, they would still  
9   owe 50 cents per subscriber. And we would be left  
10  with a distribution problem of where that money  
11  should go but --

12          Q.    Aren't you mixing it up, Mr. Israelite?  
13  The 50 cents per sub floor is part of the process to  
14  determine what the royalty pool is. Once the  
15  royalty pool is determined, only those Copyright  
16  Owners whose works have been played get the benefit  
17  of that royalty pool. Don't you agree with that  
18  proposition?

19          A.    I agree that that is how the royalty is  
20  collected.

21          Q.    Thank you.

22          A.    What I am submitting for you is that the  
23  way that it is structured, if there were to be no  
24  plays, you would still have a royalty pool due and  
25  you would have a problem of where to distribute it.

1           Q.    There is really no problem with how to  
2 distribute it.  It goes only to those persons or  
3 corporations who are the owners of the copyrights  
4 that have been played.  Right?

5           A.    It has never been a problem because there  
6 has always been plays, I'm sure.

7           Q.    Mr. Israelite, we're going to be here a  
8 long time if we can't get to "yes" on some of these  
9 questions.

10                   The pool is determined by the process,  
11 which is the greater of, as we talked about, a  
12 percentage-of-revenue or the lesser of two  
13 variables, subject to a 50 cent per subscriber floor  
14 for the portable subscription service, right?  You  
15 are with me?  That's the pool?

16           A.    Yes.

17           Q.    And the pool of money, let's call it 100  
18 units of money, that 100 units of money in a given  
19 reporting period only goes to those owners of  
20 copyrights that have actually been played?  That's  
21 the way the statute works, isn't it?

22           A.    Yes.

23           Q.    Thank you.

24                   JUDGE STRICKLER:  You mean the way the  
25 regulation works?

1 MR. STEINTHAL: That's the way the regs  
2 work, yes.

3 JUDGE BARNETT: The record should reflect  
4 that the publication of amendments to the rules in  
5 the Federal Register, to which the -- to which  
6 counsel and the witness were just referring is  
7 Exhibit 6015 for the record.

8 MR. STEINTHAL: Thank you.

9 (Google Exhibit 6015 was marked for  
10 identification.)

11 BY MR. STEINTHAL:

12 Q. And your proposal in this case has a  
13 similar allocation provision, does it not? Once you  
14 determine, albeit under your formula, the greater  
15 of .0015 cents per-play or \$1.06 per subscriber or  
16 user, it gets distributed, the pool gets distributed  
17 pursuant to this same sort of allocation formula,  
18 correct?

19 A. I understand our proposal to work similar  
20 to how the 10 and a half percent versus the 50 cent  
21 floor would work to the royalty pool.

22 Q. Right. So there is no change in the fact  
23 that whatever pool is generated, the way your  
24 proposal works for any given reporting period, only  
25 those Copyright Owners whose works have been played

1 will actually receive payments, right?

2 A. I believe that is how it would work, yes.

3 Q. Okay. And you nonetheless have the view,  
4 and I heard you explain it, that from a payment  
5 perspective the Services should pay even if a given  
6 user makes no use of a service in a given month, the  
7 Services should pay the Copyright Owners because of  
8 their ability to access the library of music,  
9 correct?

10 A. It is because they are paying because of  
11 the music. Because of the ability to access is  
12 certainly one way to say it.

13 Q. And what you are saying is even if  
14 somebody doesn't use it, if they are0, you know,  
15 stick with Google's service, so we don't have to get  
16 confused with Amazon.

17 Even if a Google subscriber never uses  
18 the service, you believe that the Service should pay  
19 because you believe the Copyright Owners should be  
20 paid for the right to access the music independent  
21 of the actual use of the service, right?

22 A. It is because they are paying Google to  
23 be able to use the music. And whether they use it  
24 or not, the economic transaction has been to  
25 Google's benefit because of the availability of our

1 songs. We call it the gym member, the gym user,  
2 similar to how a person will pay their gym every  
3 month, whether they use it or not.

4 Q. So the answer is yes, you believe that  
5 the Copyright Owners should be paid for the benefit  
6 of access, right? I mean, you testified as much in  
7 your testimony, right?

8 A. Yes, I am just trying not to get hung up  
9 on your phraseology of access, because I believe you  
10 are going to try to twist that. I am trying to make  
11 sure it is clear that it is because the customer has  
12 -- is paying Google for the service.

13 And whether they use it or not, we  
14 believe that the songwriters who write the songs  
15 deserve to share in that economic transaction.

16 Q. I think you have said that several times  
17 and the answer could have been shorter, but I'm  
18 going to postulate this: Isn't it true,  
19 Mr. Israelite, that it is actually the Services that  
20 provide the access to these musical works and not  
21 the Copyright Owners under the Section 115  
22 compulsory license? Would you agree with that  
23 proposition?

24 A. In the case of the five companies here,  
25 they are the ones providing the access directly to

1 the customer.

2 Q. So you agree that it is the Services that  
3 provide the benefit of access, not the Copyright  
4 Owners, under the Section 115 compulsory license?

5 A. No, I don't agree with that.

6 Q. I didn't think you would. So let's dig  
7 down on that. It is true, is it not, that the  
8 Section 115 license is not a blanket license?

9 A. That's correct.

10 Q. Rather, licensees under the Section 115  
11 license need to request the statutory license on a  
12 work-by-work basis. Correct?

13 A. No, there are other ways to license but  
14 that is one way to do it.

15 Q. Under the statutory license you are  
16 telling me there is a way to do it other than a  
17 work-by-work basis?

18 A. I am saying you can license it without  
19 using the statutory process.

20 Q. That wasn't my question. I asked it  
21 under the statutory license. Isn't it true that  
22 under the Section 115 statutory license, the  
23 licensee has to request and serve a notice of intent  
24 work-by-work?

25 A. If they use the statutory license, yes.



1 Q. We're here to set fees and terms for the  
2 statutory license, aren't we?

3 A. We are, but those fees and terms are  
4 often imported into work-around licensing that goes  
5 on for most of the licensing. So that's why I --

6 Q. The answer is yes, we're here for one  
7 purpose, to set rates --

8 A. If you are going to answer for me, I  
9 don't need to sit here.

10 Q. Well, if you would answer yes, rather  
11 than with an additional tag-along, I wouldn't have  
12 to follow up.

13 MR. ZAKARIN: Objection.

14 JUDGE BARNETT: We don't need to get into  
15 this. Can we just ask the questions and get the  
16 answers?

17 MR. STEINTHAL: Yes.

18 JUDGE BARNETT: Thank you.

19 BY MR. STEINTHAL:

20 Q. In fact, as you testified earlier today  
21 regarding Exhibit 333, that joint article with  
22 Jonathan Potter, you have proposed legislative  
23 changes in the form of SIRA that would make the  
24 Section 115 compulsory license a blanket license,  
25 rather than a work-by-work license, right?

1           A.    It is actually a quilt because we're not  
2   proposing a single source for a blanket, but it  
3   would be -- you have ability of getting blanket  
4   coverage if you were to get license from each of the  
5   DAs that existed and designated agent. That's how  
6   the SIRA proposal would have worked.

7           Q.    Can we call up Exhibit 333, please. It  
8   is already in evidence. You will see in the fourth  
9   paragraph it says, "SIRA solves the problems with  
10  the existing system by creating a statutory blanket  
11  licensing method that will allow digital music  
12  services to make a simple filing for all musical  
13  works." Do you see that?

14          A.    Yes.

15          Q.    Is that a correct statement?

16          A.    Yes, it is a blanket licensing process.  
17  It may be a distinction not important for this  
18  process, but in some environments the difference is  
19  significant between a single sourced license and  
20  multiple agent licenses, which is what was proposed.  
21  So I am just trying to be clear.

22          Q.    But under the Section 115 license as it  
23  now stands, when it comes to the compulsory license  
24  a Service's ability to offer access to one song, 100  
25  songs, or a million songs is entirely contingent on

1 whether the Service secures access to one song, 100  
2 songs, or a million songs under the compulsory  
3 licensing process, correct?

4 A. It should be.

5 Q. It is, right?

6 A. No. There are Services that are offering  
7 songs where they have not achieved a license, but --

8 Q. I'm glad you said that. We're going to  
9 come to that subject right now. I know your  
10 testimony on that.

11 But to access 1 million songs under the  
12 statutory license, your testimony is that the  
13 Service would have to send a million notices of  
14 intent in order to access each one of those million  
15 songs, correct?

16 A. If they were using the statutory process,  
17 which maybe you assumed in your question but I  
18 didn't hear it in your question, if they are using  
19 the statutory process, then each song would require  
20 a direct license.

21 Q. And if they don't do it completely and  
22 they fail to secure an NOI for any one of the  
23 million songs they are trying to offer access to,  
24 the Service faces the risk of an infringement claim,  
25 correct?

1           A.    If the Service offers access to a song  
2   for which it does not have an appropriate license,  
3   they are subject potentially to copyright  
4   infringement.

5           Q.    And there have been several lawsuits  
6   asserting hundreds of millions of dollars in  
7   statutory damages under the Copyright Act based  
8   precisely on the failure of certain Services to  
9   secure proper NOIs under Section 115, correct?

10          A.    I don't know how many.  I believe several  
11   is accurate, though.  I believe there were two  
12   purported class actions filed against Spotify and  
13   there may have been others as well.

14          Q.    Indeed, the NMPA recently settled claims  
15   against Spotify for Spotify's alleged failure to  
16   secure mechanical licenses to unmatched  
17   compositions, right?

18          A.    Yes, we and Spotify reached an agreement.  
19   We never sued them.  We reached an agreement to  
20   address that concern.

21          Q.    But the NMPA members have brought and  
22   settled similar claims, not just against Spotify,  
23   right?

24          A.    Lawsuits against interactive streaming  
25   companies?

1 Q. For allegedly unmatched compositions  
2 under the Section 115 license, right?

3 A. I don't -- I am trying to recall a  
4 lawsuit we have brought against an interactive  
5 streaming company. I don't recall one.

6 Q. Other than -- but you are familiar with  
7 the fact that suits have been brought against  
8 Rhapsody, against Spotify, correct?

9 A. I just mentioned the two that were filed  
10 against Spotify.

11 Q. And you are familiar that there is  
12 another lawsuit against Rhapsody?

13 A. Yes, I recall one against Rhapsody.

14 Q. Again, for the same issue where there was  
15 unmatched content that they made available, even  
16 though they tried and failed to find the copyright  
17 owner associated with a given mark?

18 A. I think you are assuming quite a bit into  
19 ascribing what the Services did or didn't do. I  
20 will let the lawsuits speak for themselves. But if  
21 you are asking about NMPA, we have not brought one  
22 of those lawsuits.

23 Q. Now, back to the article.

24 JUDGE STRICKLER: Excuse me just one  
25 second. NMPA hasn't brought a suit. Have members

1 of NMPA brought the suits?

2 THE WITNESS: Mostly every music  
3 publisher in the country is a member of NMPA. And  
4 for those who filed against Spotify, I am trying to  
5 remember -- the first lawsuit was brought by a  
6 songwriter named David Lowery and the second was by  
7 a songwriter named Melissa Ferrick.

8 And I honestly don't know if they are  
9 current members of NMPA but they may be. They are  
10 both songwriters that brought those purported class  
11 action suits. And I think the suit has been  
12 combined, and it hasn't been certified yet as a  
13 class, but it has been brought as a potential class,  
14 I believe.

15 JUDGE STRICKLER: Thank you.

16 BY MR. STEINTHAL:

17 Q. And you are familiar with the phrase  
18 "unmatched," pending and unmatched?

19 A. I am very familiar with that phrase, yes.

20 Q. And these lawsuits are about content that  
21 has been unmatched but, nonetheless, access to the  
22 music has been offered by the Service, correct?

23 A. I don't want to describe the allegations  
24 in these lawsuits because they weren't mine. And  
25 there may have been additional allegations in these

1 lawsuits that I am not familiar with, so I am not  
2 comfortable answering the extent of what the  
3 allegations were in those suits.

4 But I certainly will admit that one of  
5 the things that I know was of concern was the idea  
6 that the Services were offering songs for which they  
7 did not have a proper license.

8 Q. And isn't part of your understanding that  
9 in some cases they had sought but failed to finalize  
10 an NOI process?

11 A. I'm sorry, who is --

12 Q. Isn't it your understanding that some of  
13 the services had hired Harry Fox to try to match the  
14 publishing ownership to the works that they wished  
15 to offer access to?

16 A. I believe all of the Services use a  
17 vendor either that they hire from the outside or  
18 that they own from within like Google, that attempts  
19 to do the proper licensing. And I believe the suit  
20 is about, that the particular Spotify suit is about  
21 offering songs for which that process did not  
22 produce a license, if I understand at least  
23 partially what the allegation is, but it is not our  
24 suit. We didn't bring that suit.

25 Q. Let's go back to Exhibit 333. I read you

1 a part of the article where you referred to problems  
2 with the existing system. Do you recall that? It  
3 is the fourth paragraph.

4 A. Yes.

5 Q. And later in the middle column, you refer  
6 to, I quote, "the risk of costly infringement  
7 litigation." Do you see that?

8 JUDGE STRICKLER: Which paragraph in that  
9 second paragraph?

10 MR. STEINTHAL: It is the second to last  
11 paragraph of the middle paragraph.

12 JUDGE STRICKLER: Second to last full  
13 paragraph?

14 MR. STEINTHAL: Yes, the one that starts  
15 "the biggest winner, however, will be music fans."  
16 I will read it. "Legitimate digital music providers  
17 will dramatically expand the number of songs they  
18 offer consumers. New, innovative music services  
19 will join the market, no longer daunted by  
20 inefficient licensing procedures and the risk of  
21 costly infringement litigation."

22 Do you see that?

23 A. Yes.

24 Q. The costly infringement litigation risk,  
25 that is the risk borne by the Services, correct?



1           A.   Well, it is costly to bring it as well  
2 but, yes, it is referring to the risk of the  
3 Services.

4           Q.   And that would be avoided if we had a  
5 blanket license, that's part of what SIRA was all  
6 about, right?

7           A.   That particular type could be avoided.  
8 It wouldn't necessarily, but it could be avoided  
9 with the SIRA proposal because of the ability to,  
10 again, I use the word quilt, but achieve a blanket  
11 result.

12          Q.   Okay. This might be a good time to take  
13 our break and move to a different topic.

14               JUDGE BARNETT: How much more do you  
15 have, Mr. Steinthal?

16               MR. STEINTHAL: I have got at least  
17 another half an hour.

18               JUDGE BARNETT: Okay. We will take our  
19 afternoon recess, 15 minutes.

20               (A recess was taken at 2:31 p.m., after  
21 which the hearing resumed at 2:52 p.m.)

22               JUDGE BARNETT: Please be seated. Mr.  
23 Steinthal, are we in closed session or open?

24               MR. STEINTHAL: Still in open.

25               JUDGE BARNETT: Thank you.

1           MR. STEINTHAL: Just to address some of  
2 the panel's questions, we're going to mark as an  
3 exhibit, I doubt there will be an objection, the  
4 actual motion to adopt settlement that was signed  
5 and filed in the 2012 Phono II proceeding.

6           JUDGE STRICKLER: So are we in agreement  
7 that we can actually make that part of the 2012  
8 exhibit or that we already have? That would make it  
9 a complete exhibit? That was an exhibit within an  
10 exhibit, right?

11          MR. STEINTHAL: Well, I think the -- I  
12 don't technically think that's true, Judge. I think  
13 that the agreement was before the motion to adopt  
14 was filed. So I think it just attached the form of  
15 motion that was -- that everybody agreed would be  
16 filed.

17          JUDGE BARNETT: Correct.

18          MR. STEINTHAL: And then subsequently the  
19 motion was filed.

20          JUDGE BARNETT: So we will mark it. And  
21 I think we probably could take an official notice,  
22 since it is part of our greater record anyway.  
23 Thank you for providing it. It makes it easier.  
24 Ms. Whittle, it is --

25          THE CLERK: 6016.

1 JUDGE BARNETT: Thank you, 6016. Any  
2 objection to that being admitted for purposes of  
3 this hearing? 6016 is admitted.

4 (Google Exhibit Number 6016 was marked  
5 and received into evidence.)

6 BY MR. STEINTHAL:

7 Q. And just to put a pin in this, Mr.  
8 Israelite, the testimony you have given about de  
9 novo language having been put in the regs, let me  
10 turn your attention to page 18.

11 A. Of what?

12 Q. Of -- anybody give the witness --

13 JUDGE FEDER: 6016?

14 JUDGE STRICKLER: This is the one.

15 BY MR. STEINTHAL:

16 Q. It is actually page 18 of Exhibit A,  
17 which is the proposed regs, you will see a reference  
18 in Section 385.17. It says effective rates. It  
19 says, "in any future proceedings under 17 U.S.C.  
20 Section 115(C)(3) C and D, the royalty rates payable  
21 for a compulsory license shall be established de  
22 novo."

23 That's the de novo provision you were  
24 referring to?

25 A. I assume that it is. I don't know where

1 it is in the regulation, but my understanding was it  
2 was somewhere in the language, yes.

3 JUDGE BARNETT: Just for completion, for  
4 the sake of completion, it is Subpart C, there is  
5 identical language in 385.26.

6 BY MR. STEINTHAL:

7 Q. Okay. Mr. Israelite, Mr. Elkin asked you  
8 some questions this morning about your view about  
9 the rate standards of a willing seller/willing buyer  
10 and the 801(b) factors, and I don't want to rehash  
11 all of that.

12 I just want to ask you whether the NMPA  
13 has ever tried to conduct a calculation of what the  
14 difference would be in the rates that they secure  
15 under the willing buy -- that they secure under the  
16 801(b) factors and what they would get if a willing  
17 buyer/willing seller standard was applied?

18 A. I can recall one exercise where we  
19 attempted to do a formula that was based on the, I  
20 believe it was SDARS I case, where in that case  
21 there was some commentary by the Court of the rate  
22 differences between the two standards, and that we  
23 took that difference and we applied it to our  
24 existing revenue stream and made an argument that  
25 this shows you an upside potential of a different

1 rate standard. I recall that.

2 Q. Yeah. Well, let's actually take a look  
3 at an exhibit that you looked at yesterday, which  
4 was Copyright Owner Exhibit H-2501, which is the  
5 same document Mr. Elkin showed you for the 2016  
6 year.

7 A. The other book?

8 Q. But for 2015. It is called 2015 Annual  
9 Meeting Industry Revenue Steps. Do we need to go to  
10 restricted for this?

11 MR. ZAKARIN: We probably should. I just  
12 want to note that this is so weird, it wasn't for  
13 the 2016 year, that page. That page was 2016  
14 meeting. I think it was for the 2015 year.

15 MR. STEINTHAL: Okay.

16 JUDGE STRICKLER: What is the exhibit  
17 number again?

18 MR. STEINTHAL: The exhibit number was  
19 2501 in the binder that was given to the witness by  
20 Mr. Zakarin.

21 JUDGE BARNETT: It is the 2016 annual  
22 meeting, it is 2502.

23 MR. STEINTHAL: If it is easier to look  
24 at 309 from this morning, that's fine too.

25 THE WITNESS: It is okay to look at the

1 one from --

2 BY MR. STEINTHAL:

3 Q. Whatever you have in front of you, and  
4 anybody in the room who wants to follow, it is  
5 either 309 from this morning or 2501 from yesterday.

6 MR. ZAKARIN: Which meeting, which annual  
7 meeting?

8 JUDGE STRICKLER: What was the 3 number?

9 MR. STEINTHAL: 309.

10 JUDGE FEDER: 309, last page.

11 BY MR. STEINTHAL:

12 Q. I will try to do this without going into  
13 restricted session. Do you have it in front of you,  
14 Mr. Israelite?

15 A. Yes.

16 Q. Are you looking at the document called  
17 2015 Annual Meeting Industry Revenue Steps?

18 A. Yes.

19 Q. Okay. Now, go to step 8. It says, does  
20 it not, "calculate value of mechanical revenue using  
21 willing buyer/willing seller standard instead of  
22 801(b) standard." Then it says "(13 to 6 ratio)."  
23 Right?

24 A. Yes.

25 Q. So is this the exercise that the NMPA did

1 to try to look at how much more they would collect  
2 in royalties if they were operating under a willing  
3 buyer/willing seller standard rather than the 801(b)  
4 standard?

5 A. Yes, this is what I was remembering of  
6 that exercise.

7 Q. Okay. And, in effect, what you were  
8 doing was believing that or setting forth your  
9 belief that under a willing buyer/willing seller  
10 standard, you would achieve approximately 2.12 times  
11 more in royalties under the 801(b) factor -- I'm  
12 sorry, under the willing buyer/willing seller than  
13 you would under the 801(b) factors, right?

14 JUDGE STRICKLER: You said 2.12?

15 MR. STEINTHAL: 2.12 times. There is a  
16 multiplier. If you look at step 8, there is a  
17 figure which is -- I don't want to say it out loud,  
18 unless --

19 JUDGE STRICKLER: Okay, don't.

20 MR. STEINTHAL: But there is several  
21 hundred million dollar figure. And it is then  
22 multiplied by 2.167 to get to a number that is --  
23 are you with me on step 8?

24 JUDGE STRICKLER: I am. You said 2.12.

25 THE WITNESS: He was rounding.

1 MR. STEINTHAL: I was rounding.

2 JUDGE FEDER: That would round to 2.17.

3 JUDGE STRICKLER: That was round to 2.17.

4 That was my confusion. I thought I was looking at  
5 the wrong page. I wasn't trying to check your math.

6 THE WITNESS: To Google it is just a  
7 rounding error.

8 BY MR. STEINTHAL:

9 Q. So let me start over and try to make this  
10 clean. It is true, is it not, that what you were  
11 doing was multiplying the existing royalty under the  
12 801(b) standards and you multiplied by 2.167 to get  
13 to what you thought you would achieve under a  
14 willing buyer/willing seller standard, right?

15 A. I don't think it is fair to say I thought  
16 it was what we would achieve, but it was applying  
17 the ratio from the SDARS I case, as I recall, that  
18 same ratio to our mechanical revenue and coming up  
19 with a number that, if you apply that ratio, this is  
20 what the number would look like.

21 Q. But SDARS or no SDARS, what you were  
22 trying to do is apply a multiplying factor to what  
23 you were receiving for Section 115 royalties under  
24 the 801(b) standards and what you think you would be  
25 able to obtain under a willing buyer/willing seller



1 standard, right?

2 A. Again, I wouldn't say what we would be  
3 able to obtain, but it was certainly an exercise to  
4 demonstrate the potential upside of the rate  
5 standard that we were pursuing in Congress.

6 Q. And isn't it true that the actual rate  
7 proposal that you have made in this proceeding is  
8 virtually identical in terms of a per-subscriber  
9 minimum as applying the same multiplier to the 50  
10 cents per sub floor under the existing rates?

11 A. If the math works out that way, that was  
12 not how we got to the per user -- again, not per  
13 subscriber but per user number. We didn't use a  
14 formula based on the 50 cent to that, that I'm  
15 aware.

16 But the 50 cent mechanical-only, we are  
17 proposing today \$1.06 from the B-3 subcategory.

18 Q. And you wouldn't dispute the math that it  
19 would take a 50 cent per sub minimum or floor for a  
20 mechanical rate and multiply it by 2.167, you get  
21 very close to \$1.06, right?

22 A. I don't know what the number would be.  
23 But, again, that wasn't how we got to the \$1.06, but  
24 it may end up being that those numbers are close.

25 JUDGE STRICKLER: How did you get to the

1 \$1.06?

2 THE WITNESS: The \$1.06 per subscriber,  
3 as I recall, was based from a range that our experts  
4 proposed. And that then I conditioned with my  
5 membership as to where they felt they should come  
6 out in the proposal. And we ended up somewhere  
7 within that range.

8 JUDGE STRICKLER: Do you know -- so it  
9 was based on the range your experts developed?

10 THE WITNESS: Yes, sir.

11 JUDGE STRICKLER: Do you know whether  
12 your experts utilized the 50 cent subscriber floor  
13 and developed their range in that manner, then  
14 applying this multiple?

15 THE WITNESS: I don't recall ever reading  
16 or hearing that that's how they did it, but I can't  
17 speak for what they did.

18 JUDGE STRICKLER: Thank you.

19 BY MR. STEINTHAL:

20 Q. Now, you take the position in your  
21 written testimony that the settlement of the Subpart  
22 A proceeding reflects the NMPA's recognition that  
23 permanent digital downloads just like physical  
24 products -- well, let me back up.

25 I believe you testified today and in your

1 written testimony that the reason that you agreed to  
2 the Subpart A settlement in this proceeding was  
3 because of a recognition that permanent digital  
4 downloads in the physical products are a rapidly  
5 declining business, is that it?

6 A. Where in my direct statement are you  
7 referring?

8 Q. In your rebuttal testimony, paragraph 49.

9 A. Rebuttal 49? Yes.

10 Q. It is true, is it not, though, that there  
11 is still, with each of the digital download business  
12 and the physical phonorecords business, it is still  
13 more than a 2 billion dollar a year industry for  
14 each segment, correct?

15 A. I won't know about 2016 until we get the  
16 data from that calendar year, so I don't know what  
17 the total dollar number would be.

18 Q. But for 2015, you would agree with me  
19 that it was at least a 2 billion dollar business on  
20 each side?

21 A. I don't have the numbers. I mean, I will  
22 go back and refer to the numbers, but I believe  
23 that's -- I'm sorry, say the number again?

24 Q. More than 2 billion?

25 A. No, I don't think that's close to the

1 numbers that we talk about.

2 Q. Maybe we're confusing terms. Let me show  
3 you what we will mark as Impeachment Exhibit 6017, I  
4 think.

5 THE CLERK: Yes.

6 (Google Exhibit 6017 was marked for  
7 identification.)

8 JUDGE STRICKLER: Before we get to that  
9 document, so I don't lose the thread, before when I  
10 asked you, Mr. Israelite, whether or not the 50 cent  
11 mechanical floor was used, if it was multiplied by  
12 the 2.167, you said you didn't know, the experts  
13 went through a process and you have no idea whether  
14 they actually did that or not because you weren't  
15 privy to what they did.

16 Is that a fair statement?

17 THE WITNESS: I don't -- I don't know if  
18 it wasn't because I wasn't privy to it or whether I  
19 just am not aware of what formula they used to  
20 propose their ranges, but I don't know how they came  
21 about to their ranges.

22 JUDGE STRICKLER: I just wanted to set it  
23 up, because my question is a who question. Who are  
24 the experts you are referring to?

25 THE WITNESS: We retained several

1 economic experts in this case that worked through  
2 our outside counsel. And they brought proposals  
3 through my outside counsel that we then considered  
4 when we were deliberating as a Board over what our  
5 proposal would be.

6 JUDGE STRICKLER: Are any of those  
7 individuals the experts who are testifying on your  
8 behalf in this proceeding?

9 THE WITNESS: I believe so, but --

10 JUDGE STRICKLER: Do you know which ones?

11 THE WITNESS: I am trying to recall which  
12 experts. I don't recall the names of which expert  
13 made which range proposals and which ones are  
14 testifying. I'm sorry.

15 JUDGE STRICKLER: Thank you.

16 BY MR. STEINTHAL:

17 Q. So does looking at this document -- you  
18 are familiar with RIAA shipment data statistics that  
19 come out from time to time?

20 A. Yes, I am generally familiar that they  
21 come out with revenue data like this.

22 Q. If you turn to the second page under  
23 figure 4, you will see that there is a reference to  
24 digital download revenues including digital tracks  
25 and albums, declining 10 percent to 2.3 billion

1 dollars for 2015. Do you see that?

2 A. Yes.

3 Q. You don't have any basis to dispute that  
4 number, do you?

5 A. I don't have any reason to doubt this  
6 number.

7 Q. And if you look in the next column under  
8 figure 5, it says total value of shipments in  
9 physical formats was 2 billion, down 10 percent from  
10 the prior year.

11 A. I'm sorry, this is --

12 Q. Right under figure 5.

13 A. Right under figure 5, okay.

14 Q. You don't have any reason to dispute, do  
15 you, that in 2015 the physical format sales were 2  
16 billion dollars?

17 A. For sound recording owners, no.

18 Q. Okay, I am just asking that. Now -- and  
19 your testimony in paragraph 49 of your rebuttal was  
20 that, as we just went through, you just basically  
21 didn't feel that it was worth in such a declining  
22 market to expend resources to litigate over that  
23 rate, correct, the Subpart A rate?

24 A. Yes, I don't believe for the five-year  
25 period subject to this CRB that the Subpart A

1 categories will be economically significant to us.

2 Q. It's true, is it not, that in the  
3 Phonorecords I proceeding, notwithstanding that you  
4 recognized that CD sales were diminishing, you  
5 argued for an increase in the Subpart A rates,  
6 right?

7 A. Yes, our proposal in Phono I was for an  
8 increase in the physical rate and a greater increase  
9 in the download rate, if I remember correctly.

10 Q. And even in a diminishing market, you  
11 felt that it was worthwhile to seek an increase in  
12 the rate in Phonorecords I for Subpart A activity,  
13 correct?

14 A. Absolutely, yes.

15 Q. Now, it is fair to say, is it not, that  
16 one of the contentions in your testimony is that the  
17 current rate structure, meaning from Phonorecords  
18 II, was negotiated when the streaming industry was  
19 nascent and without information about the business  
20 models of the Digital Services?

21 A. Yes, I believe that in Phonorecords II,  
22 we still believed that the streaming models were  
23 experimental.

24 Q. And obviously that's true of what your  
25 belief is even during Phonorecords I in 2008, right?

1 A. Yes.

2 Q. Now, you have taken the position, have  
3 you not, that no one knew what the Streaming  
4 Services business models might be?

5 A. I'm sure I have taken that position, yes.

6 Q. But just stick with Phono I. By the  
7 mid-2000s when the Phonorecords I settlement was  
8 being negotiated, there were many existing  
9 interactive streaming services, weren't there?

10 A. None that were economically significant,  
11 but there may have been a larger number that were  
12 attempting to enter the space.

13 Q. Well, Mr. Elkin went there a little bit,  
14 I am going to go there a little bit more deeply.

15 You are familiar with the fact that there  
16 was a major rate court proceeding in the ASCAP Rate  
17 Court between ASCAP and AOL, Yahoo, and RealNetworks  
18 during the mid-2000s?

19 A. I don't recall specifically that rate  
20 proceeding, but I have no reason to think there  
21 wasn't.

22 Q. Okay. And it is true, is it not, that it  
23 was a matter of public record that what ASCAP was  
24 litigating against these companies was how to  
25 attribute the revenues associated with multifaceted



1 Internet companies and portals, how to attribute  
2 that revenue to music Copyright Owners, on the one  
3 hand, as opposed to the rest of the businesses  
4 operated by those portals? You knew that was  
5 happening, right?

6 A. I have no idea what arguments were made  
7 in that case. I was not involved in that case.

8 Q. Let me -- let me ask you to take a look  
9 at the decision of Judge Conner in the ASCAP Rate  
10 Court proceeding to which I just referred.

11 MR. ZAKARIN: I think this was brought up  
12 yesterday. If the witness has no idea about it,  
13 what is the purpose of a decision to -- you can't  
14 impeach the witness about something he doesn't know  
15 about.

16 JUDGE BARNETT: I was about ready to ask.  
17 Where are we going with this, Mr. Steinthal?

18 MR. STEINTHAL: Just about the  
19 description of the services that is set forth to see  
20 whether he remembers that, in fact, there were, with  
21 this decision, there were services, interactive  
22 music services operating during the very time period  
23 preceding Phono I that presented many of the same  
24 concerns that he claims no one knew about.

25 JUDGE STRICKLER: Are you trying to

1 refresh his recollection?

2 MR. STEINTHAL: Yes. And we will see  
3 whether it is refreshed or not.

4 JUDGE BARNETT: It can be used for that  
5 purpose. Those of you old enough to remember Irving  
6 Younger will remember you can refresh recollection  
7 with a plate of fettuccine.

8 MR. ZAKARIN: Irving Younger was my  
9 ethics professor.

10 JUDGE BARNETT: You are lucky.

11 MR. ZAKARIN: I was lucky, although it  
12 was 8:00 in the morning.

13 JUDGE STRICKLER: How did you enjoy the  
14 fettuccine?

15 MR. ZAKARIN: I do remember the nose  
16 being bitten off. That story I recall.

17 JUDGE BARNETT: And this is Exhibit 6018?

18 THE CLERK: 6010. It was already marked.

19 JUDGE BARNETT: Okay, thank you. 6010.

20 BY MR. STEINTHAL:

21 Q. You will see in paragraph 125, Mr.  
22 Israelite, the description of the AOL Music Now  
23 subscription service?

24 MR. ZAKARIN: Paragraph 125?

25 BY MR. STEINTHAL:

1 Q. Paragraph 125 on page 352.

2 A. Okay.

3 Q. Does looking at the description of AOL  
4 Music Now for one flat monthly fee and AOL Music Now  
5 subscribers had unlimited access to streaming  
6 on-demand. Does that reflect your recollection at  
7 all that in the prior passage here that between 2005  
8 and 2007, AOL was operating that service?

9 A. It does not, but I -- I was aware there  
10 were several Services that were attempting to engage  
11 in the activity that we called interactive streaming  
12 or limited downloading. As I mentioned before in my  
13 testimony, several of them took advantage of the,  
14 what we called the RIAA styled 2001 agreement.

15 Q. And some of them stayed in existence  
16 through 2008 and ultimately paid royalties based on  
17 whatever the outcome was of the Phonorecords I  
18 proceeding, right?

19 A. I am not aware of who stayed in existence  
20 or not. I can tell you that at that time our  
21 attitude was that it was just so insignificant that  
22 it didn't merit any attention, but I don't recall  
23 which companies were in existence and when they  
24 stopped being in existence.

25 Q. Well, you are not disputing, are you,

1 that each of AOL and Yahoo and RealNetworks  
2 operating the Rhapsody service were all operating  
3 interactive streaming services during the time  
4 period that the Phonorecords I case was being  
5 litigated, right?

6 A. I recall Rhapsody is a party that did  
7 that. I have no reason to dispute the other two,  
8 but I have no memory of the other two.

9 Q. And, in fact, you knew that there were --  
10 that there was the contemplation that there would be  
11 free non-subscription interactive services at the  
12 time of the Phonorecords I case, right?

13 A. The concept of a free advertising-based  
14 service was around during Phono I. And it was  
15 something that was accommodated in the settlement,  
16 although I don't have a memory whether anyone was  
17 actually doing it at the time or whether it was  
18 aspirational as a category.

19 Q. Well, you said yesterday, you described  
20 it as a theoretical category, did you not?

21 A. I don't recall using that word, but I'm  
22 telling you now, I don't recall whether anyone was  
23 actually operating in the United States with that  
24 type of a model, but it was a model that was  
25 important to the DiMA side to be included in the

1 Subpart B category.

2 Q. You don't dispute that you used the word  
3 "theoretical" yesterday? We can go to the  
4 transcript.

5 A. I don't remember using the word  
6 "theoretical" but I may have.

7 Q. Okay. Now -- and it is true, is it not,  
8 that even in the testimony you cited this morning  
9 from Mr. Sheeran, he specifically raised the issue  
10 of non-subscription free services in his testimony.

11 Let's go to -- I will get the right  
12 exhibit number -- excuse me, Your Honors, I had it  
13 here a moment ago.

14 JUDGE STRICKLER: Which binder are we  
15 looking for?

16 MR. STEINTHAL: I think it was in a  
17 couple of binders. Here it is. Exhibit 322, the  
18 written rebuttal testimony of Dan Sheeran.

19 BY MR. STEINTHAL:

20 Q. Paragraph 28. I'm sorry, I am having  
21 trouble finding. Oh, I'm sorry, in paragraph 28,  
22 you will see that in explaining the proposal, Mr.  
23 Sheeran says, and I quote, "The proposed minima also  
24 recognized that business models are evolving and  
25 that both subscription and non-subscription

1 offerings may develop over the next five years."

2           So this is a topic that actually came up  
3 from the DiMA witnesses that it was important to  
4 have a rate structure that would allow for free  
5 ad-supported services, correct?

6           A.   No. Two things. Number 1, I'm not sure  
7 at all when he says non-subscription, that he means  
8 free ad-supported. I could think of other things he  
9 might have meant. I don't know what he meant, but  
10 he certainly didn't say free ad-supported.

11           And, secondly, when he says these  
12 offerings may develop over the next five years, that  
13 seems to confirm my memory they weren't actively  
14 existing at that time.

15           Q.   Well, let's probe your memory. Are you  
16 familiar with a service called Lala --

17           A.   No.

18           Q.   -- that ultimately was bought by Apple?  
19 You don't remember that at all?

20           A.   I do not.

21           Q.   Let's take a look at what we will mark as  
22 Impeachment Exhibit 6018?

23           THE CLERK: Yes.

24           (Google Exhibit 6018 was marked for  
25 identification.)

1 JUDGE STRICKLER: While we're awaiting  
2 that, you said that you don't necessarily equate  
3 non-subscription offerings with ad-supported as  
4 being coextensive.

5 What else do you understand  
6 non-subscription offerings to potentially mean?

7 THE WITNESS: I don't know what he meant,  
8 but a bundle could be a non-subscription, for  
9 example.

10 JUDGE STRICKLER: Anything else?

11 THE WITNESS: That theoretically could be  
12 a non-subscription? A locker could be a  
13 non-subscription, I suppose. You could purchase it  
14 and not be a subscriber to it and own it.

15 I suppose there are other theoretical  
16 models where, for example, you buy a concert ticket  
17 and you get access to some music. That to me  
18 wouldn't be a subscription model, but something that  
19 a service might be interested in doing. I could  
20 probably come up with lots of different ideas. I  
21 just don't know what he meant by that.

22 JUDGE STRICKLER: Thank you.

23 MR. ZAKARIN: Again, with respect to Mr.  
24 Steinthal marking an exhibit presumably offered as  
25 an impeachment exhibit, the witness has said he

1 doesn't know what Lala is or hasn't heard of it. I  
2 suppose that we will then move to the next  
3 alternative of refreshing his recollection, but it  
4 is certainly not impeachment.

5 MR. STEINTHAL: Shall I address it?

6 JUDGE BARNETT: Yes, please.

7 MR. STEINTHAL: The witness claims to  
8 have been very much involved in the digital music  
9 industry and negotiating these arrangements. There  
10 are and were Services during the mid-2000s engaged  
11 in, among other things, free Internet -- interactive  
12 streaming.

13 And I am trying to see whether looking at  
14 an article will refresh his recollection that Lala  
15 was one. And the other one is last.fm, which was  
16 acquired by CBS.

17 JUDGE BARNETT: You can -- well, you  
18 can't refresh your recollection -- well, yes, you  
19 can. You may attempt to refresh a recollection, but  
20 he has already said he doesn't have any memory of  
21 it.

22 BY MR. STEINTHAL:

23 Q. Okay. And is it your testimony that you  
24 don't remember the launch of last.fm in the United  
25 States after it was acquired by CBS?



1 A. Are you asking about last.fm or Lala?

2 Q. I am shifting. I am moving to last.fm.

3 A. Okay. I don't remember the specific  
4 launch, but I have heard that name before. I'm  
5 familiar that there was a last.fm.

6 Q. At least on this one, you do recall the  
7 service, right?

8 A. I do recall a last.fm service.

9 Q. And it included free interactive  
10 streaming, did it not?

11 A. I don't know what it included.

12 Q. Would it refresh your recollection to  
13 look at an article that reports about what kind of  
14 service last.fm is?

15 A. I don't know. This article seems to  
16 conflict with how you described the service for Lala  
17 so I am reading --

18 Q. I'm sorry. You don't need to look at  
19 that. The Judge convinced me that it was, there was  
20 no point, after you testified that you didn't  
21 remember the service. I am just moving aside from  
22 that.

23 A. Okay.

24 Q. You do remember last.fm. Take a look at  
25 what we will mark as Impeachment Exhibit 6018.

1           A.    This was 18, I believe.

2                   THE CLERK:   6019.

3                   (Google Exhibit 6019 was marked for  
4   identification.)

5   BY MR. STEINTHAL:

6           Q.    Does the reporting in this article that  
7   last.fm, which was acquired by CBS, that last.fm  
8   will now offer on-demand streaming of millions of  
9   tracks from all four major labels and a host of  
10   Indies for free? Does that refresh your  
11   recollection as to what kind of service last.fm was  
12   operating in 2008?

13          A.    May I finish reading the article? I'm  
14   sorry, your question again?

15          Q.    Does it refresh your recollection that,  
16   in fact, last.fm was operating in 2008 offering free  
17   interactive streaming?

18          A.    No. I was familiar with the brand. I  
19   don't think it ever rose to the level of engaging  
20   with what they did, but it doesn't refresh a memory  
21   that they were offering ad-supported streaming in  
22   January of 2008.

23          Q.    Okay. Now, you did state before that no  
24   one knew, as you testified in several places in your  
25   written direct and rebuttal testimony, no one knew

1 what the streaming services' business models might  
2 be at the time of the Phonorecords I, correct?

3 A. Yes, I think in Phonorecords I, there was  
4 a great deal of uncertainty as to where the models  
5 might go. There was some models that existed and  
6 others that I recall, you know, there was an attempt  
7 to get ahead of the models, because obviously you  
8 are setting rates for a future period, but I think  
9 all the parties would admit they didn't know where  
10 it was going.

11 Q. Isn't it true that in Phonorecords I, the  
12 Copyright Owners themselves were aware of the fact  
13 that subscription music services, particularly those  
14 run by big tech companies, might pursue a variety of  
15 revenue models, which would have to be addressed in  
16 any Copyright Royalty Board proceeding?

17 A. Oh, the big tech companies from 2008  
18 don't even -- I mean, they are not the same big tech  
19 companies that we're dealing with here. I think we  
20 knew as early as 2001 that streaming was a model  
21 that had to be addressed. And that's why we entered  
22 into the RIAA-styled agreement, which we later made  
23 available to other digital companies.

24 We were aware that that model of  
25 streaming was coming. But by the time of the

1 settlement in 2008, there was no economic  
2 significance to it. And the type of streaming was  
3 something that we certainly weren't clear as to  
4 which way it would go. Just the fact that in the  
5 settlement, the first category B-1 was a  
6 non-portable category, suggests the mind-set at the  
7 time that the parties thought that the primary use  
8 would be on a computer, not on a phone or other  
9 portable device.

10           It wasn't until the third category, B-3,  
11 that we even addressed portability. That shows you  
12 just how early this was in the thinking.

13           Q. I think my question could have been  
14 answered yes or no without that kind of long answer.  
15 And I really would appreciate so we can finish this.  
16 When a question is a yes-or-no question, try to  
17 answer it yes or no.

18           A. If I feel like your questions are  
19 answerable that way I will, Mr. Steinthal. When I  
20 think that they are not answerable that way, then I  
21 will attempt to, to the best of my ability, give an  
22 honest answer.

23           MR. ZAKARIN: If I can, I defer to the  
24 Court to either tell the witness what to do or talk  
25 to Mr. Steinthal, but I don't think they should be

1 engaging in their own private dialogue.

2 JUDGE BARNETT: Let me repeat, let's just  
3 cut out the colloquy.

4 MR. STEINTHAL: I am happy to.

5 JUDGE BARNETT: And ask the questions and  
6 elicit the answers. Answer only the question that  
7 is asked, please, Mr. Israelite. I'm sorry.

8 THE WITNESS: That's all right.

9 BY MR. STEINTHAL:

10 Q. Are you denying that there was so much  
11 information about how interactive streaming services  
12 were part of multimedia companies in the mid-2000s,  
13 so much so that the NMPA in its position in the  
14 Phonorecords I case sought very carefully to  
15 identify the need to parcel out what revenue streams  
16 of a multifaceted company should come into the  
17 revenue base of any particular rate structure and  
18 what would not?

19 A. Attempting to answer your question yes or  
20 no, it is a long question, I think the answer is  
21 yes, I am denying that.

22 Q. Okay. Well, let's take a look at the  
23 expert report from your expert in the Phonorecords I  
24 case and see if that refreshes your recollection,  
25 okay? Can I have the Enders report from Phono I.

1 MR. ZAKARIN: Is this being offered  
2 merely to refresh his recollection?

3 MR. STEINTHAL: Actually, to impeach his  
4 last answer.

5 MR. ZAKARIN: Okay.

6 THE CLERK: Marked as 6020.

7 (Google Exhibit 6020 was marked for  
8 identification.)

9 JUDGE BARNETT: Ms. Whittle, 6020, did we  
10 miss 19?

11 JUDGE FEDER: This was 19, the last.fm.

12 JUDGE BARNETT: I'm sorry. Go ahead.

13 BY MR. STEINTHAL:

14 Q. I would like you to take a look at page  
15 27. First of all, is this a copy of one of the  
16 expert reports submitted by the Copyright Owners in  
17 the Phono I proceeding?

18 A. I believe that it is.

19 Q. Dated November 29, 2006, if you look at  
20 the first page, correct?

21 A. Yes.

22 MR. STEINTHAL: I would move this exhibit  
23 into evidence.

24 MR. ZAKARIN: I thought it was being  
25 offered for impeachment?

1 JUDGE BARNETT: Likewise.

2 MR. STEINTHAL: Well, all right.

3 BY MR. STEINTHAL:

4 Q. Let me ask you to take a look at page 27.

5 Do you see where your expert states,

6 "subscription-based services pursue a variety of  
7 revenue models. The principal objective of  
8 companies such as Yahoo is to attract users to its  
9 site in order to sell on-line advertising. Music  
10 subscription services are important elements in  
11 helping to drive users to web portals such as Yahoo  
12 and to that extent aggressively price their  
13 offerings in order to maximize subscriber numbers."

14 That's a position that was articulated by  
15 the Copyright Owners back in 2006, correct?

16 A. This appears to be from one of our  
17 expert's reports from 2006, yes.

18 Q. So you were aware of large technology  
19 companies that might be motivated to aggressively  
20 price music offerings in order to attract users who  
21 don't monetize the music services in the manner that  
22 you had hoped, correct?

23 A. I'm sorry, I was finishing the sentence.

24 Q. You were aware this argument was being  
25 made back in 2006, correct?

1           A.    The argument that the Services were  
2 underpricing their music service in order to get  
3 ancillary benefits?

4           Q.    That and exactly what Ms. Enders says in  
5 the paragraph I just read to you.

6           A.    Yes, when she describes on-line  
7 advertising, I don't think she is talking about the  
8 advertising on the music service, but I think she is  
9 commenting on the advertising on the Yahoo, in  
10 general.

11          Q.    And the objective, I mean, the argument  
12 that any revenue-based license would have to take  
13 into consideration that the licensee's principal  
14 objective might be to attract users to its site in  
15 order to sell on-line advertising or to help drive  
16 users to other aspects of the company's business,  
17 that's an argument that Ms. Enders made in this very  
18 report in 2006, correct?

19          A.    She seems to be making this about Yahoo  
20 in particular here, yes.

21          Q.    And that sounds very familiar to some of  
22 the arguments you are making today, right, in this  
23 proceeding?

24          A.    No, I think it is quite a bit different.

25          Q.    Okay. Now, when you say in paragraph 6



1 of your rebuttal testimony that at the time of  
2 Phonorecords I, no one knew that the company's  
3 operating --

4 A. I'm sorry, paragraph 6?

5 Q. Of your rebuttal testimony.

6 A. Okay. Okay.

7 Q. When you say in paragraph 6 that at the  
8 time of Phonorecords I, no one knew that the  
9 companies operating interactive music services might  
10 include companies with -- and I quote -- "other  
11 unrelated businesses, such as digital devices, data  
12 collection, and physical non-music product  
13 delivery," that's not exactly right, is it? Because  
14 at least some of those things were things that  
15 Ms. Enders was anticipating in 2006, right?

16 A. No, I think you read this incorrectly and  
17 have twisted the meaning of what I wrote. The  
18 paragraph reads, "No one knew who would be operating  
19 streaming services or what their business models  
20 might be."

21 And then you -- I think you were tying in  
22 the "no one knew" to the later phrase. What is  
23 directly written here is no one knew who would be  
24 operating streaming services or what their business  
25 models might be.

1 Q. Well, these business models of the nature  
2 that Ms. Enders describes, you are saying no one  
3 knew in 2006, right?

4 A. Oh, I think it exactly proves our point.  
5 All the companies from Phono I are not the companies  
6 we're talking about today, which is exactly why back  
7 in Phono I we had no idea which companies might be  
8 the ones that dominated this space.

9 Q. Mr. Israelite, while Yahoo and AOL, for  
10 example, are no longer operating interactive music  
11 services, they were in 2006, were they not? And  
12 they were operating services that, in fact,  
13 monetized music subscription services as a small  
14 part of their overall business offering, correct?

15 A. Yes, I believe that for those two  
16 companies, the music service was a small part of  
17 their overall enterprise.

18 Q. And one of the positions that the NMPA  
19 took in the Phono I proceeding was it was important  
20 to make sure that there were accurate attributions  
21 of revenue to the music service, notwithstanding  
22 that the companies offering them were large,  
23 multimedia companies, correct?

24 A. I don't recall Ms. Enders full report  
25 from this period. I am happy to review it again,

1 but I believe that she was making that argument from  
2 the one paragraph that you read on page 27. I am  
3 looking at the list of services underneath that. I  
4 don't know how much she makes that argument about  
5 the others, but --

6 Q. And Table 9 refers to a whole bunch of  
7 services that were respectively or -- well, let me  
8 rephrase that.

9 Table 9 refers to a number of services  
10 that would be covered by Subpart B, correct?

11 A. Well, it describes them as limited  
12 downloads or interactive streams, and those would be  
13 covered by Subpart B.

14 Q. So as of 2006, it is clear, is it not,  
15 that your expert knew that AOL Music Now,  
16 Musicmatch, Rhapsody, Yahoo Music, Zune Marketplace,  
17 which I think we identified as Microsoft, Napster,  
18 they were all operating services that would be  
19 subject to Subpart B; isn't that right?

20 A. Yes, I have been, I think, clear that  
21 there were many companies that were attempting to  
22 operate in this space back then.

23 Q. And you wouldn't deny that you testified  
24 in Phono I that one issue that will be critical will  
25 be the define properly the revenue base against

1 which the percent rates would be applied?

2 A. I don't remember my testimony from Phono  
3 I, but I may have said that.

4 Q. Okay. Let me ask you to take a look at  
5 your written statement in Phonorecords I.

6 A. Is that a new exhibit or one of the ones  
7 I have?

8 THE CLERK: 6021.

9 JUDGE BARNETT: And the purpose of this,  
10 Mr. Steinthal?

11 MR. STEINTHAL: Excuse me?

12 JUDGE BARNETT: The purpose of this  
13 previously unmarked exhibit?

14 MR. STEINTHAL: It is an impeachment  
15 exhibit.

16 JUDGE BARNETT: Thank you.

17 JUDGE STRICKLER: What is the number  
18 again?

19 THE CLERK: 6021.

20 (Google Exhibit 6021 was marked for  
21 identification.)

22 BY MR. STEINTHAL:

23 Q. Take a look at paragraph 37, please.

24 JUDGE STRICKLER: 30 what?

25 MR. STEINTHAL: 37.

1 THE WITNESS: Okay.

2 BY MR. STEINTHAL:

3 Q. Is it correct that you testified in  
4 Phonorecords I that one issue that will be critical  
5 will be to define properly the revenue base against  
6 which the percent rates would be applied; given the  
7 rapidly evolving business models of digital music  
8 distribution, music may generate revenue in a number  
9 of ways? That was your testimony, was it not?

10 A. Yes.

11 Q. And as a consequence you proposed a rate  
12 structure not limited to a percentage-of-revenue,  
13 correct?

14 A. In Phono I?

15 Q. Yes.

16 A. Yes. We had a proposal that was a tiered  
17 proposal of the greater-of formula, greater-of  
18 formula of different factors.

19 Q. And it was precisely because the NMPA was  
20 aware of the complicated nature of ascribing revenue  
21 to multimedia companies and allocating it to music  
22 services that the Copyright Owners expressed  
23 concerns about structuring the rates exclusively as  
24 a percentage-of-revenue, right?

25 A. No.

1 Q. Well, that's one of the reasons, right?

2 A. That may have been one of the reasons.

3 It wouldn't have been the largest reason.

4 Q. And as a consequence, you negotiated  
5 certain minima to ensure a base level of  
6 compensation to the Copyright Owners, whatever level  
7 of revenue was generated by the music offerings of a  
8 given service, right?

9 A. I don't believe I thought of them as  
10 minima, but they were alternate prongs of a  
11 greatest-of formula.

12 Q. And in your written rebuttal testimony in  
13 this case, in paragraph 20 --

14 A. In this case?

15 Q. Yes. You talk about Mr. Parness'  
16 testimony and you agree with certain aspects of his  
17 testimony, do you not?

18 A. Let me read paragraph 20.

19 JUDGE STRICKLER: Which paragraph is that  
20 again, counsel?

21 MR. STEINTHAL: Written rebuttal  
22 testimony, paragraph 20.

23 THE WITNESS: Okay.

24 BY MR. STEINTHAL:

25 Q. Don't you acknowledge here that the

1 minima that the NMPA negotiated for in Phonorecords  
2 I for the Subpart B rates were, in fact, the  
3 consequence of your having foreseen what you refer  
4 to as the reality that has come to pass? Do you see  
5 that?

6 A. Yes.

7 Q. And you were aware at the time of the  
8 Phonorecords I of the fact that services were  
9 already interested in bundling music services  
10 eligible for the Section 115 license with other  
11 services and products, right?

12 A. In Phono I, I believe, yes, of course,  
13 that was one of the categories that we settled as  
14 part of the Subpart B.

15 Again, I don't recall how much of the  
16 bundling had existed in the marketplace versus was  
17 aspirational, but it was clearly a concern of DiMA.

18 Q. So it was known, it wasn't one of those  
19 things that no one knew back in 2006 and 2007, it  
20 was known that the Services were interested in  
21 bundling, correct?

22 A. The Services expressed an interest in  
23 almost everything. They wanted categories to  
24 accommodate basically a wish list of what might  
25 happen. I don't think the answer for the bundling

1 is any different than the other categories.

2 I don't recall there being bundling  
3 happening in the marketplace, but they clearly had  
4 an interest in that category or we wouldn't have  
5 included it in the settlement.

6 JUDGE STRICKLER: Mr. Israelite, in  
7 Phonorecords I in the final regulations that you  
8 said were ultimately adopted, you set forth  
9 definitions of service revenue, correct?

10 THE WITNESS: I believe that's correct,  
11 yes.

12 JUDGE STRICKLER: And that was done in  
13 part to be able to sort of corral the revenue in the  
14 way that you could agree to?

15 THE WITNESS: Yes. This was a new  
16 concept in mechanical licensing. We had always had  
17 penny rates before this. And so the concept of  
18 a percent being applied was something new.

19 And unlike a business deal, where you can  
20 make a short-term deal and you can protect yourself  
21 better, this was, you know, a statutory new thing.  
22 And I think that we attempted to define service  
23 revenue in a way that could try to protect us.

24 JUDGE STRICKLER: And that protection was  
25 embodied, again, in the settlement of Phonorecords



1 II as well, correct?

2 THE WITNESS: Yes.

3 JUDGE STRICKLER: Did you propose any  
4 further protection in the form of audit rights in  
5 the event you wanted to be able to verify that the  
6 revenue that was being designated, in fact, included  
7 all revenue that was properly attributable under the  
8 regulation?

9 THE WITNESS: I don't recall whether an  
10 audit right was something that was negotiated at  
11 that time. It is something that is often a topic of  
12 tension between licensors and licensees, but I don't  
13 recall how much an audit right played into the  
14 negotiation of whether it would come up or not.

15 JUDGE STRICKLER: Was it proposed at all  
16 on behalf of the Copyright Owners?

17 THE WITNESS: It may have been. I just  
18 don't recall, Judge.

19 JUDGE STRICKLER: Thank you.

20 BY MR. STEINTHAL:

21 Q. One more thing on the "no one knew"  
22 testimony, Mr. Israelite. You take the position, do  
23 you not, that at the time of Phonorecords I -- and  
24 this is in your, again, written rebuttal testimony,  
25 paragraph 6 -- no one knew who would be operating

1 streaming services, and you go on to say that "it  
2 was believed" and you go on "that the record labels  
3 might be the entities who would operate these  
4 services." Do you see that?

5 A. Yes.

6 Q. In reality, by the time of the  
7 Phonorecords I settlement, the labels had already  
8 exited the interactive music streaming service  
9 industry, had they not?

10 A. My recollection is that their initial  
11 foray into that space was unsuccessful and they had  
12 exited, but that they were expressing regret about  
13 that. And there was some sense that they wanted to  
14 reenter, is my memory.

15 I think they -- but their thinking  
16 changes quite a bit, as you know.

17 Q. But the reality is you knew that the  
18 labels were players in the interactive music  
19 industry in 2001 when they operated Press Play and  
20 MusicNet and you knew that they had exited those  
21 ventures by 2004, correct?

22 A. That's correct.

23 Q. Okay. And as of the time of Phonorecords  
24 I, they had not reentered to take control of any  
25 interactive music service, right?

1           A.    Oh, I think that's why I wrote that the  
2   record labels might be the entities who would  
3   operate those services in the future. I think we  
4   didn't know.

5           Q.    Yeah, well, you did know that they had  
6   been in and exited. What you didn't know was  
7   whether they might get in later, right? Correct?

8           A.    I think that attempts to summarize what I  
9   have said.

10          Q.    Yes. And by 2008, it is fair to say, is  
11   it not, that the NMPA had foreseen the issue of  
12   on-demand subscription services substituting for and  
13   displacing purchases of recorded music, right?

14          A.    Sure. The concept that someone would use  
15   a legal subscription service instead of purchasing  
16   was always a present risk.

17          Q.    And that was a risk that you and the NMPA  
18   had spoken about at various times, that on-demand  
19   subscription services were cannibalizing the  
20   purchase market, correct?

21          A.    I'm sure that was a concern I expressed  
22   at the time, yes.

23          Q.    It is something that you knew by 2008,  
24   the time of the Phonorecords I settlement? Yes?

25          A.    That I knew that it was cannibalizing?

1 Q. From a timing perspective, it is  
2 something you knew by the time Phonorecords I was  
3 settled, right?

4 A. I believe it was a concern from the  
5 inception of the model. It was going to be a  
6 different model, and to the same that downloads  
7 cannibalized physical sales.

8 Q. Let me ask you to take a look at  
9 Exhibit 334.

10 A. 334?

11 Q. Yes.

12 A. Is that in which book?

13 Q. Probably was in the initial binder that  
14 Mr. Elkin gave you.

15 A. Oh, okay.

16 Q. But, if not, we will circulate copies  
17 anyway.

18 A. My trial book jumps from 333 to 335.

19 JUDGE STRICKLER: Yeah, same here, unless  
20 they are out of order.

21 THE WITNESS: I haven't seen a 334 tab  
22 somewhere else. Thank you.

23 BY MR. STEINTHAL:

24 Q. Exhibit 334, can you identify this as a  
25 joint press release from NMPA/RIAA, DiMA, the NSAI

1 and SGA issued after an agreement on the  
2 Phonorecords I settlement?

3 A. No, I don't think that's what this is.

4 Q. Is it an HFA release that includes the  
5 joint press release that was issued?

6 A. Yes, it appears to be a publication put  
7 out by HFA, and within it it appears to have  
8 language from a press release that was put out by  
9 those parties.

10 MR. ZAKARIN: Can I ask if this is being  
11 offered for impeachment or as evidence-in-chief?

12 MR. STEINTHAL: No, it would be  
13 evidence-in-chief.

14 MR. ZAKARIN: It was not identified  
15 yesterday, or I guess it was two nights ago when it  
16 would have been identified, but it wasn't  
17 identified.

18 MR. STEINTHAL: I thought it was. I'm  
19 sorry.

20 MR. ZAKARIN: I mean, I don't want to  
21 make a big thing of it. It's a document, if you  
22 want to put it in, go ahead, but I just note that it  
23 is not a document that was identified. It should  
24 have been.

25 I have been taken to the woodshed over

1 that a couple of times. It felt good to do it once.

2 JUDGE BARNETT: Thank you. This is  
3 marked as Amazon Trial Exhibit 334 and not a secret  
4 to anyone. Are you offering it?

5 MR. STEINTHAL: I am offering it, yes.

6 JUDGE BARNETT: 334 is admitted.

7 (Amazon Exhibit Number 334 was marked and  
8 received into evidence.)

9 BY MR. STEINTHAL:

10 Q. Did you or the NMPA review and approve  
11 the text of this joint press release before it was  
12 issued?

13 A. I don't recall doing so for this one, but  
14 it would be our standard practice that I would  
15 review a press release before it went out.

16 Q. And there is a reference to the SGA,  
17 which is an organization that I don't think has been  
18 identified in this proceeding. Can you tell us what  
19 the SGA is?

20 A. The Songwriters Guild of America.

21 Q. And do you see where you are quoted as  
22 saying "this agreement will ensure that songwriters  
23 and music publishers continue to thrive in the  
24 digital age"?

25 A. Where are you reading from?

1 Q. The second page.

2 A. Okay.

3 Q. In the third paragraph. You say: "This  
4 agreement will ensure that songwriters and music  
5 publishers continue to thrive in the digital age. I  
6 am grateful for the good faith efforts of everyone  
7 involved in the discussions leading to this  
8 important announcement."

9 That was accurate when you issued this  
10 release, correct?

11 A. Yes.

12 Q. Now, just a couple of questions about the  
13 Phonorecords II discussions that led to the final  
14 agreement.

15 I think in response to Mr. Elkin's  
16 questions, you acknowledged that Google was present  
17 in the negotiations that led to the Subpart B and C  
18 settlement, correct?

19 A. They were definitely a member of DiMA at  
20 that time, that I recall.

21 Q. And I believe you actually testified in  
22 response to your counsel's questions that you  
23 remember them actively involved on the question of  
24 lockers, because they wanted to have free lockers.  
25 Do you remember giving that testimony?

1           A.    Yes, I recall that Google had -- I don't  
2 recall whether it was expressed to me through DiMA  
3 or directly from Google, but I recall that Google  
4 had an interest in a particular category during that  
5 negotiation.

6           Q.    And when you testified earlier that they  
7 were interested in Subpart A, I believe you  
8 testified, gave that answer to Mr. Elkin, they  
9 weren't a licensee under Subpart A, were they?

10          A.    I don't recall when they started selling  
11 downloads under Subpart A, but I thought that that  
12 was the category that was of interest to them at  
13 that time.

14          Q.    Yeah, but the labels are the ones that  
15 pay the digital download royalty, right?

16          A.    Oh, well, that's -- that's -- that's very  
17 confusing. Yes, the labels technically are the ones  
18 that pay, but they pay from the royalty paid to them  
19 from Google.

20          Q.    And so that's why the RIAA has  
21 participated in the Subpart A discussions, right,  
22 because it is the label representatives that pay  
23 royalty, right?

24          A.    No. The labels participate primarily  
25 because of the physical configuration, where they



1 are the actual party who sells and collects the  
2 money.

3 Under the digital download arrangement,  
4 to date the labels have served as a pass-through  
5 license but that doesn't necessarily need to be so  
6 and wouldn't necessarily continue. So the digital  
7 companies who sell downloads have often also been  
8 primarily interested in the rate for a digital  
9 download.

10 Q. Now, and I think you did acknowledge to  
11 Mr. Elkin that even though in your written testimony  
12 you testified that none of the five companies that  
13 are participating in this proceeding were engaged in  
14 interactive streaming at the time of those  
15 negotiations, actually each of Apple, Amazon, and  
16 Google were directly involved in the discussions  
17 either through DiMA or directly at the negotiating  
18 table because of their interests, either presently  
19 or in the future, in Subpart B and Subpart C  
20 activities, correct?

21 A. No, I don't think that you can ascribe  
22 their interest in it being about Subparts B and C.  
23 I think it was primarily about Subpart A. The  
24 settlement in Phono II was a settlement that rolled  
25 forward the A and the B together and created the C.

1                   And you had a dynamic of where all of the  
2 DiMA companies were interested in that settlement  
3 because they all had some interest in one or more of  
4 the categories. But my recollection at the time was  
5 that those companies were primarily concerned about  
6 the Subpart A rates.

7           Q.    Let me ask you to take a look at your  
8 deposition transcript on this issue.

9           A.    Okay. I need to find my deposition.

10          Q.    Page 287.

11          A.    Yes, which exhibit?

12                   JUDGE FEDER: 328.

13                   THE WITNESS: 328. Okay. And, I'm  
14 sorry, which page?

15 BY MR. STEINTHAL:

16          Q.    287.

17          A.    Okay.

18          Q.    Do you see where on line 22 I say:

19                   "Question: But for our purposes today,  
20 it is true they were there, you knew they were there  
21 negotiating over Subpart C activities, yes?

22                   "Answer: I believe they were negotiating  
23 over both. All the companies, I believe, wanted to  
24 be involved in the ultimate resolution of Subparts B  
25 and C. It doesn't mean that they all had a business

1 interest in every one of the ten categories, but  
2 naturally, and I understand why they would want to  
3 be at the table and involved."

4 That testimony was accurate as to each of  
5 Apple, Amazon, and Google, was it not?

6 A. Yes, but their interest wasn't  
7 necessarily self-interest. It was also at the time  
8 I recall an interest about what their competitors  
9 would pay.

10 Q. You gave the testimony that their  
11 interest was in Subpart B and C in one of up to ten  
12 categories, right, that's what you identified in  
13 your deposition?

14 A. Yes, and I am explaining to you that that  
15 interest was not necessarily about what they were  
16 paying. That interest also included what their  
17 competitors who had different models were paying, as  
18 I recall.

19 Q. Now, you testified this morning one  
20 aspect about the negotiations that led to the  
21 Subpart B and C settlement in Phonorecords II, that  
22 you recall them wanting to have a higher rate for  
23 the Subpart 2 -- sorry, for the Phonorecords II  
24 settlement than had existed under the Phonorecords I  
25 settlement. Do you recall that?

1 A. Yes.

2 Q. It is true, is it not, that the NMPA did  
3 request an increase in the rates at the beginning of  
4 those negotiations?

5 A. I would think it would be negligent if I  
6 hadn't.

7 Q. Okay.

8 A. And not just Subpart B, but Subpart A as  
9 well.

10 MR. STEINTHAL: I see that it is getting  
11 to be 4:00 o'clock. I am going to -- I'm sure I can  
12 finish up within five or ten minutes.

13 JUDGE BARNETT: We go until 5:00.

14 MR. STEINTHAL: Okay. I am happy to  
15 continue.

16 JUDGE BARNETT: We are stalwarts. We go  
17 until 5:00. So finish as quickly as you can, but  
18 don't worry about the clock.

19 MR. STEINTHAL: Okay.

20 BY MR. STEINTHAL:

21 Q. I am not sure if this falls in the  
22 category of another document that we didn't  
23 designate, I hope we did, Exhibit 336, which is the  
24 joint press release issued after the Phono II  
25 settlement?

1           A.    My book skips from 35 to 37.

2           MR. ZAKARIN:  It wasn't designated.  I  
3 will look at it.

4           JUDGE BARNETT:  Thank you.

5 BY MR. STEINTHAL:

6           Q.    Is this a copy of the joint press release  
7 that was issued by the parties after resolution of  
8 the Phonorecords II settlement?

9           A.    This appears to be the same language from  
10 the HFA document, but embedded in a DiMA  
11 announcement of some type.

12          Q.    This was after Phonorecords II, not after  
13 Phonorecords I, is it not?

14          A.    I don't see a date on this.  But I  
15 believe this would be Phono II.

16          Q.    Isn't there a date, date released, April  
17 11, 2012?

18          JUDGE STRICKLER:  Where is the date on  
19 the document?

20          MR. STEINTHAL:  It is under the  
21 microphone in the middle of the --

22          THE WITNESS:  Under the microphone?

23          JUDGE STRICKLER:  There is a microphone?

24          MR. STEINTHAL:  We may have different  
25 copies.

1 MR. ZAKARIN: Whatever, since Cary  
2 Sherman is mentioned in here, I don't see a date on  
3 it.

4 THE WITNESS: I don't either.

5 JUDGE STRICKLER: It does mention  
6 lockers.

7 THE WITNESS: No, it is clear it is from  
8 Phono II but it is not clear the date and it appears  
9 to be something that -- it wasn't the actual press  
10 release, but it looks to be something put out by  
11 DiMA.

12 MR. STEINTHAL: Okay.

13 THE WITNESS: And it may embed a press  
14 release that we put out.

15 BY MR. STEINTHAL:

16 Q. I am just working with a different copy  
17 that is the joint press release. I'm sorry. So my  
18 bad. We will just move on.

19 A. Okay.

20 Q. Just a couple of little things from what  
21 you testified about this morning, just to clarify.

22 You made the point that you don't recall  
23 Zahavah Levine being part of any negotiations that  
24 led to Phonorecords I; is that right?

25 A. I don't recall engaging with Ms. Levine

1 directly, no.

2 Q. But you do mention in paragraph 5 of your  
3 rebuttal testimony that Mr. Michael King from  
4 RealNetworks was involved?

5 A. Paragraph, I'm sorry, 5?

6 Q. Paragraph 5, yes. Do you see the  
7 reference to Michael King --

8 A. Yes, I do.

9 Q. -- as being involved. RealNetworks owned  
10 Rhapsody, correct?

11 A. Yes, I believe that's right.

12 Q. And do you know that Mr. King reported to  
13 Ms. Levine while she was at RealNetworks and  
14 Rhapsody?

15 A. I don't know what the organization chart  
16 was of RealNetworks.

17 Q. Okay. And also you made a reference to  
18 Bertelsmann acquiring Napster. Bertelsmann didn't  
19 acquire Napster, right, they simply made an  
20 investment in Napster that led to the lawsuit?

21 A. I don't recall it being phrased as an  
22 investment. I recall they took some control over  
23 it, but whether it was -- I don't know the --

24 Q. You don't really know?

25 A. The method by which they invested or took

1 control, no, I do not.

2 Q. Okay. And do you recall that in that  
3 case the Court held that making a work available  
4 without some other activity was not an infringement?

5 A. That case settled before it reached a  
6 resolution, so I am not sure what you are referring  
7 to.

8 Q. You don't recall an earlier part of the  
9 decision where it was determined that providing  
10 access to a song does not implicate a copyright  
11 right, unless the user actually accesses the song?

12 A. No, I don't recall that from any language  
13 of that decision.

14 Q. Now, you testified in response to Mr.  
15 Elkin that the process is very simple, I wrote those  
16 words down, quote/unquote, to get licensed by SESAC  
17 and GMR. Do you remember saying that?

18 A. I don't remember exactly what I said, but  
19 it probably was that to achieve a performance  
20 license, it is a simple process.

21 Q. And you have never negotiated a license  
22 with GMR or SESAC, have you?

23 A. No, I have not.

24 Q. And are you aware of pending antitrust  
25 litigation between the broadcast radio industry and



1 GMR over GMR's licensing demands and alleged  
2 violations of the antitrust laws?

3 A. I'm familiar that there are two different  
4 lawsuits. There was one that was brought by an  
5 organization called the RMLC, which stands for the  
6 Radio Music Licensing Committee, against GMR.

7 And I'm aware of an unrelated suit filed  
8 by GMR against the RMLC. And I believe both of them  
9 have antitrust allegations in them.

10 Q. And they relate to GMR's licensing  
11 activities in the RMLC's efforts to obtain licenses  
12 from GMR, right?

13 A. I don't know the extent of what the  
14 allegations are in those suits.

15 Q. And you are aware, are you not, that  
16 there was a prior antitrust litigation between both  
17 the local television industry and the broadcast  
18 radio industry with SESAC over SESAC's licensing  
19 demands and alleged violations of the antitrust  
20 laws, right?

21 A. I'm aware that there were those two suits  
22 that settled, yes.

23 Q. And are you aware that there was just  
24 recently a two-week litigated proceeding between  
25 SESAC and the RMLC over license terms for broadcast

1 radio from SESAC?

2 MR. ZAKARIN: I would just want to  
3 observe Mr. Steintal has already announced that he  
4 is a counsel in that case or he is involved in that  
5 case and he is wandering into an area where he may  
6 be crossing the witness/attorney line.

7 JUDGE BARNETT: Are you making an  
8 objection?

9 MR. ZAKARIN: I am concerned about a  
10 question, yes. I'm concerned about a question by a  
11 counsel in a case relative to that case because it  
12 does involve the potential of the attorney/witness  
13 problem.

14 MR. STEINTAL: I am not going there,  
15 Your Honor.

16 JUDGE BARNETT: Okay. Sustained.

17 MR. STEINTAL: The simple question, Your  
18 Honor, of whether he is aware that getting a license  
19 from SESAC has led to both antitrust and rate  
20 setting proceedings with SESAC, can I ask him that  
21 question?

22 JUDGE BARNETT: Yes.

23 THE WITNESS: As I understand -- I think  
24 you used the phrase that there was a two-week  
25 litigation and I think that's not accurate. I

1 think, as I understand it, the settlement that was  
2 entered into between SESAC and the RMLC provided for  
3 an arbitration process to set rates, and that they  
4 are engaged in that process now. And that was a  
5 mutually-agreed upon process.

6 BY MR. STEINTHAL:

7 Q. The prior litigation was an antitrust  
8 litigation, correct?

9 A. The litigation that was brought, I don't  
10 know all the allegations. I do know that it was  
11 settled and that it led to an agreement upon a  
12 process of arbitration, which is what has recently  
13 just occurred.

14 Q. Mr. Israelite, one last thing: There has  
15 been a transformation in the music industry since  
16 the 1990s for publishers and labels that you have  
17 talked about in terms of the effects of technology  
18 diminishing mechanical royalties through first  
19 piracy, then the disaggregation of the album and the  
20 advent of digital streaming, correct?

21 A. I'm sure I have spoken about all those  
22 subjects in the past.

23 Q. But you have witnessed, have you not,  
24 other major shifts in consumer behavior responsive  
25 to technological changes in the movie industry after

1 the introduction of the VCR and DVD technology where  
2 the movie industry initially thought it was the  
3 death of their business, but in the end the movie  
4 industry ultimately benefitted from the very  
5 technological changes and consumer behavior shifts  
6 which the movie industry initially dreaded, isn't  
7 that right?

8 A. I have used that example, but I, to be  
9 clear, I have used it to make the point that when  
10 you own property, you have a right to make bad  
11 decisions about your own property.

12 And in the case of the VCR, the motion  
13 picture industry was dead wrong about whether those  
14 technologies would be good or bad, but that at least  
15 they had the benefit of getting to decide for  
16 themselves, is how I would use that analogy.

17 Q. And you have used the analogy to show  
18 that an industry that suffers diminished revenues  
19 due to technological change can often adjust and  
20 create new revenue streams which more than offset  
21 what they have lost from the old technology, right?

22 A. It can, although I don't know the  
23 economics of whether it offset it or not, but  
24 certainly they thought it would be bad if it became  
25 an important revenue source.

1 MR. STEINTHAL: I have nothing further.

2 JUDGE BARNETT: Thank you. Although we  
3 may be stalwart, we are not invulnerable, so we will  
4 take a five-minute break.

5 (A recess was taken at 4:11 p.m., after  
6 which the hearing resumed at 4:22 p.m.)

7 JUDGE BARNETT: Please be seated.

8 MR. ASSMUS: We have some brief  
9 questioning on behalf of Spotify, Your Honor.

10 JUDGE BARNETT: Thank you.

11 CROSS-EXAMINATION

12 BY MR. ASSMUS:

13 Q. All right. Good afternoon, Mr.  
14 Israelite. Richard Assmus on behalf of Spotify. I  
15 have just one topic for you today, hopefully a  
16 lighter topic than the rest of the day.

17 The NMPA is responsible for giving out  
18 certain awards to songwriters, correct?

19 A. Yes.

20 Q. And yesterday on direct you noted that  
21 the NMPA gives out gold and platinum songwriting  
22 certifications, correct?

23 A. Yes.

24 Q. That's the NMPA's gold and platinum  
25 program; is that right?

1 A. Correct.

2 Q. And the NMPA has been giving out those  
3 awards since 2007, correct?

4 A. That sounds correct, yes.

5 Q. And that started after you joined the  
6 NMPA?

7 A. Yes, it was my idea.

8 Q. It was your idea? So I take it you are  
9 familiar with the program?

10 A. Well, the program, the gold and platinum  
11 program, to be clear, is owned by the RIAA. It is a  
12 trademarked program. That has been going on for  
13 maybe 60 years.

14 My idea was to expand that program and to  
15 allow NMPA to designate gold and platinum awards for  
16 writers, since the RIAA's program only honors the  
17 artists.

18 Q. And when you -- you were responsible for  
19 launching that program?

20 A. Yes, I was.

21 Q. And when you were launching it, did you  
22 advise the NMPA's Board of that launch?

23 A. I'm sure I did.

24 Q. And what do gold and platinum mean?

25 A. The RIAA program was a program that

1 recognized certain metrics of sales, and they have,  
2 I believe, they had or have three different types of  
3 categories. They had album awards, they had singles  
4 awards, and they even had ringtone awards to show  
5 you just how wrong we can be sometimes.

6           And what we were interested in doing is  
7 only looking at the singles because there would be  
8 so many writers on any one given album, potentially,  
9 that we wanted to be able to honor the writer of a  
10 single award that was already honored by the RIAA  
11 for the recording artist.

12           Q.   And gold means 500,000 level; is that  
13 right?

14           A.   Yes, I believe the -- during -- there was  
15 a negotiation over our ability to use the trademark.  
16 The RIAA wasn't excited about us borrowing this  
17 brand because it was a very valuable and high  
18 profile brand. And so my initial efforts to get  
19 permission were denied.

20                   And --

21           Q.   Let me just interrupt you. All I would  
22 like to know is does the gold level mean 500,000?

23           A.   I believe that's what the RIAA measures  
24 it as, but they have changed, I know, and that's why  
25 I don't know if it is still considered 500,000 or

1 what their -- exactly how they measure it, but they  
2 set the metrics and I believe it used to be sales of  
3 500,000.

4 And now they have incorporated streaming  
5 into the model and so I just don't know if they  
6 currently refer to it as 500,000, but I think that's  
7 right.

8 Q. And a songwriter's music award can be  
9 exploited as a download or a stream, correct?

10 A. Yes.

11 Q. And some songwriters may have more of  
12 their songs sold in downloads and others may be more  
13 prevalent in streaming?

14 A. Sure, that could be true.

15 Q. And the NMPA's version of the gold and  
16 platinum program, I think you have testified, counts  
17 both streaming and downloads, correct?

18 A. No, we don't count anything. We're not  
19 allowed to. What our program does is that when the  
20 RIAA makes a certification, under our agreement,  
21 three weeks later, we can certify the writer of that  
22 single with the same award, but we're not the ones  
23 who count or make the designation itself.

24 Q. So the RIAA when it is counting those,  
25 when it is measuring usage for those awards, it



1 needs to convert streams to downloads, correct?

2 A. They have chosen to incorporate streaming  
3 into their model some time ago. We had nothing to  
4 do with that decision.

5 Q. But the NMPA does certify songwriters for  
6 those awards based on the RIAA metrics, correct?

7 A. Yes, our agreement is that whatever  
8 metric they use, we just get to follow with our own  
9 certification, but it is their metric.

10 Q. And you understand that the RIAA uses a  
11 150-to-1 ratio for streams to downloads, correct?

12 A. Yes, I believe that when they decided to  
13 start incorporating streaming into the model, that  
14 they started using 150 streams as an equivalent of a  
15 unit for the purpose of their counting.

16 Q. And that's the basis on which the NMPA is  
17 willing to certify these awards to your songwriter  
18 members, correct?

19 A. We have no say. We are happy to certify  
20 the writers for whatever the RIAA does in their  
21 certification program.

22 JUDGE STRICKLER: Well, you have the  
23 right to just stop doing it; if you disagreed with  
24 the 150-to-1 ratio, you could say, forget it, we're  
25 not going to continue on in this venture utilizing

1 the RIAA's formula?

2 THE WITNESS: Oh, yes, Judge. It is a  
3 voluntary program. We choose to do it.

4 JUDGE STRICKLER: Thank you.

5 MR. ASSMUS: I have nothing further.

6 JUDGE FEDER: Mr. Israelite, did that  
7 conversion rate factor into your decision to join  
8 the -- or essentially piggyback on the RIAA's  
9 program one way or the other?

10 THE WITNESS: When we launched our  
11 program, I don't believe at that time they were  
12 incorporating streaming. It was just a download --  
13 if you sold a physical single it would count but  
14 there were none -- it was just a download model.

15 When they decided to -- so we had already  
16 started our program before they started counting  
17 streaming. And when they started incorporating  
18 streaming, we obviously voluntarily continued with  
19 our follow-on program.

20 JUDGE FEDER: Thank you.

21 THE WITNESS: But their, it was explained  
22 to me, that their 150 metric wasn't meant to equal a  
23 download. It was simply a numeric number they came  
24 up with for the purpose of their program.

25 MR. ASSMUS: I just want to object to the

1 last answer as beyond the scope of the Judge's  
2 question.

3 JUDGE BARNETT: Sustained.

4 MR. ASSMUS: Thank you.

5 JUDGE BARNETT: Anyone else?

6 MR. ISAKOFF: Pandora has no questions  
7 for this witness, Your Honor.

8 JUDGE BARNETT: Thank you, Mr. Isakoff.  
9 Anyone else?

10 MS. MAZZELLO: No questions for Apple.

11 JUDGE BARNETT: Thank you. Redirect?

12 MR. ZAKARIN: I am going to try and be  
13 reasonably organized and quick, the key word being  
14 "try."

15 REDIRECT EXAMINATION

16 BY MR. ZAKARIN:

17 Q. Just to try to clarify some things,  
18 first, Mr. Steinthal took you to, I believe,  
19 Exhibit -- I think it is 309, which duplicates, I  
20 think, 2500 through 2502, but we will straighten  
21 that out.

22 And actually this may have been a  
23 question that came from Judge Strickler, which was  
24 in going through the computation of the performance  
25 income there and a portion of it being for the

1 writers and a portion of it being paid to the  
2 publishers, looking just first at the performance  
3 income, which I think effectively you grossed up to  
4 account for the songwriter's share?

5 A. We grossed it up to account for both the  
6 songwriter's share and any commissions that would  
7 have been deducted.

8 Q. And you are aware, are you not, that when  
9 we talk about the publisher's share, that doesn't  
10 necessarily mean only the publishers who are  
11 members, but there are songwriters who have their  
12 own publishing company; isn't that correct?

13 MR. STEINTHAL: It is very direct -- I  
14 mean, very leading, you know, for that kind of  
15 redirect.

16 MR. ZAKARIN: It is redirect examination.

17 JUDGE BARNETT: Overruled.

18 THE WITNESS: There is a very important  
19 distinction between what's known as the publisher's  
20 share, which is generally 50 percent, and who gets  
21 that money because what is very common is that a  
22 songwriter is also a co-publisher with a publisher.

23 So a typical arrangement would be that of  
24 a dollar, that 50 cents would go to the songwriter,  
25 and then the writer would be a half co-publisher,

1 and the writer would, therefore, get another quarter  
2 and the publisher would get a quarter, so that it  
3 would really be a 75/25 split, even though it is  
4 referred to as a 50/50 split between publishing and  
5 songwriting.

6 BY MR. ZAKARIN:

7 Q. And that takes us to the second part,  
8 which was Judge Strickler asked you really how much  
9 was paid to the writers, if you could compute that.

10 And with respect to the mechanicals,  
11 that's not being -- your Exhibit, or Exhibit 309  
12 doesn't really back out, if you will, the  
13 mechanicals, does it, for the writer's share?

14 A. No, none of the exhibits analyzing the  
15 revenue attempt to divide between what ends up with  
16 a songwriter versus what ends up with a publisher.  
17 In fact, there would be no way to know that.

18 Q. And is that because the songwriter  
19 agreements vary, some are, you know, where some  
20 writers get 50 percent, some writers get 75 percent,  
21 and there are administration deals where they may  
22 get 20 or 10 percent?

23 MR. STEINTHAL: You are talking about out  
24 of the mechanical?

25 MR. ZAKARIN: Out of the mechanical, so

1 that there is a varying percentage depending upon  
2 the songwriter agreement with the publisher; isn't  
3 that correct?

4 THE WITNESS: That would be true for all  
5 of the categories, but yes for mechanical. And the  
6 range can vary, I have seen it vary anywhere between  
7 95 percent to the writer and 5 percent to the  
8 publisher, to a 50/50 split would be the range, and  
9 it would just depend on the individual circumstance  
10 of which writer and which publisher.

11 JUDGE STRICKLER: And the document was  
12 Exhibit 309, was that it?

13 MR. ZAKARIN: 309.

14 JUDGE STRICKLER: And that document  
15 didn't do that breakdown on an aggregated basis  
16 among songwriters?

17 THE WITNESS: Correct. The document  
18 merged the publishing and the writing income into  
19 one lump sum.

20 JUDGE STRICKLER: So when you were  
21 answering my question before you were just talking  
22 about a performance royalty?

23 THE WITNESS: I understood that to be  
24 your question. If I misunderstood, I'm sorry, but I  
25 understood you to ask how much of the performance

1 money goes to the writer, and that's the one that I  
2 answered, it is a 50/50 split, but, again, the  
3 writer also may be a publisher as well. That's very  
4 common.

5 JUDGE STRICKLER: I was wondering about  
6 your answer and I am glad the questions came back on  
7 redirect. So thank you.

8 BY MR. ZAKARIN:

9 Q. Looking at Exhibit 306, which I think you  
10 also should have in your binder there, there is a  
11 couple of things I want to try to do with it, and  
12 try to avoid moving around between exhibits. 306  
13 are the sheets of financials. And I will do this or  
14 I am going to try to do this without closing the  
15 room.

16 If you turn to the second page, and Mr.  
17 Elkin asked you some questions about that and he  
18 pointed out that the streaming mechanical income had  
19 gone up by 36.9 percent, correct?

20 A. Yes.

21 Q. And he noted that the drop in physical  
22 and digital were much smaller percentages, even  
23 though greater in amount, do you see that?

24 A. Yes.

25 Q. And the difference in the percentages is

1 based upon the difference in the base against which  
2 they are applied; isn't that correct?

3 A. Yes, it is year-to-year from '14 to '15.

4 Q. But it is also, in terms of the base, the  
5 physical and digital income is far greater than the  
6 streaming mechanical income?

7 A. In total dollars, yes.

8 Q. Okay. And so that a smaller percentage  
9 drop results in a higher absolute amount of dollar  
10 drop?

11 A. Correct.

12 Q. That takes me to Mr. Steinthal's question  
13 and that's why you can stay with the same exhibit  
14 and not migrate, and he showed you, I believe, if I  
15 can locate it, an exhibit which was the RIAA  
16 exhibit.

17 A. Yes.

18 Q. And I am looking to find it, but, of  
19 course -- oh, I have it, surprisingly enough, and it  
20 is Exhibit 6017. And in 6017 he was pointing out  
21 the record company revenues from physical and  
22 digital.

23 Do you recall that?

24 A. Yes.

25 Q. For 2015. And that was a significant --



1 I think it was several billion dollars, as Mr.  
2 Steinthal pointed out to you. Do you recall that?

3 A. Yes.

4 Q. But that doesn't correspond to the  
5 mechanical income that the publishers and writers or  
6 we'll call it the Copyright Owners were receiving  
7 from physical and digital; isn't that correct?

8 A. That's correct. I was confused by the  
9 question because he was using the \$2 billion number  
10 but then when I saw the document I realized he was  
11 referring to the sound recording revenue, not the  
12 music publishing and songwriting revenue.

13 Q. And the music publishing for physical and  
14 permanent downloads for 2015 appear on Exhibit 306  
15 on the second page and they are a small fraction of  
16 that \$2 billion number, are they not?

17 MR. ELKIN: Objection, Your Honor. I  
18 know it is redirect but he is not entitled to lead  
19 on redirect.

20 MR. ZAKARIN: Actually you are.

21 MR. ELKIN: No, you are not.

22 MR. ZAKARIN: We disagree. And I  
23 apologize for the colloquy.

24 JUDGE BARNETT: Thank you. Apology  
25 accepted. I generally allow some leading on

1 redirect, just to let it happen.

2 BY MR. ZAKARIN:

3 Q. Mr. Steinthal also showed you, if I can  
4 find it, Exhibit 337, which I think is probably in  
5 my volume. Let me turn to it.

6 And this was a press release -- actually  
7 this was not. This was a congressional hearing,  
8 correct?

9 A. Yes, 337 was the transcript of a  
10 congressional hearing.

11 Q. And if you turn to page 9, which was the  
12 page that Mr. Steinthal was questioning you about,  
13 and looking at the paragraph where he talked about  
14 the 25 parties, it says, and this is your statement,  
15 I think: "Just a few months ago, 25 parties  
16 completed a year-long negotiation over rates for  
17 five new categories of music services."

18 Do you see that?

19 A. Yes.

20 Q. And is that consistent with what your  
21 recollection is, which is that the year-long  
22 negotiation was over the Subpart C services, the  
23 five new services in Subpart C?

24 A. Yes. Those were the five new categories.

25 Q. Now, you were also questioned by Mr.

1 Steinthal, really from your deposition, and we will  
2 go there if we have to, but there was a discussion  
3 about experimental. And he was asking you questions  
4 about -- actually it was not Mr. Steinthal, I  
5 believe it was actually Mr. Elkin, asked you  
6 questions about experimental with respect to if  
7 Amazon exited the business. And I apologize which  
8 one of you I am confusing with the other.

9 Do you recall those questions?

10 A. I do.

11 Q. Okay. And whether, if Amazon exited the  
12 business or Google exited the business, would that  
13 make it experimental. Do you recall those  
14 questions?

15 A. I do.

16 Q. When you were discussing experimental in  
17 your statements and in your testimony, did it relate  
18 to any individual participant as opposed to the  
19 industry?

20 A. No. I think there were two different  
21 things that were being confused by the same word.  
22 In my testimony about the state of the industry in  
23 Phono I and Phono II, it is very much our belief and  
24 was then that the industry was in an experimental  
25 phase.

1                   When I was asked in my deposition about  
2 if a particular mature company today launched a  
3 service and immediately withdrew it, would it be  
4 experimental for that company, I believe I answered  
5 it would.

6                   But that's because those were different  
7 things. And I think there was a word game being  
8 played trying to marry the word "experimental" to  
9 two different things.

10                  If Google built a car today -- I think  
11 they actually do -- the auto industry isn't  
12 experimental but it may be experimental for Google.  
13 If you go back to the invention of the automobile,  
14 automobiles were experimental. And that's how I  
15 thought of it.

16                  Q. Let me take you to another question. Mr.  
17 Steinthal and you sort of, I think you were talking  
18 at cross-purposes and maybe -- I want to try to  
19 clarify that.

20                  First of all, and I think the starting  
21 questions dealt with that the request for a  
22 per-subscriber fee by the Copyright Owners is  
23 something different than has existed because you  
24 would be paying for access and you were never paid  
25 for access.

1 Do you recall those questions?

2 A. I do.

3 Q. Okay. Now, first of all, with respect to  
4 a subscription service, they get paid either monthly  
5 or annually, correct?

6 A. That's the model that is common with paid  
7 subscription services, yes.

8 Q. And they get paid regardless of whether a  
9 subscriber uses the service or doesn't use the  
10 service?

11 A. Yes.

12 Q. Okay. And you are not aware of the  
13 Services refunding to a subscriber his monthly or  
14 her monthly subscription fee if they don't, in fact,  
15 stream at all during that month?

16 A. I'm certain they don't.

17 Q. Now, you talked about the 50 cent  
18 per-subscriber mechanical-only floor, and what you  
19 said, if I caught it right, is even if there were  
20 zero streams in the universe that month, the 50 cent  
21 per-subscriber mechanical floor would still have to  
22 be paid. Correct?

23 A. Yes. That was my point is that while  
24 there will always be streams to then attribute the  
25 royalty pool, the structure of the Subpart B

1 settlement itself was consistent with the same  
2 concept, which is that a subscriber, whether they  
3 stream or not, would owe the 50 cents.

4 And if no one streamed, all of the  
5 subscribers would owe the 50 cents and you would  
6 then -- maybe it is a theoretical, you know, a  
7 hypothetical that is ridiculous, but you would have  
8 to figure out how to distribute that money with no  
9 streaming activity.

10 Q. It would be an allocation problem for the  
11 Copyright Owners, but there is still, in effect, a  
12 fee paid whether there are streams or not?

13 A. Yes. In the Subpart B rate structure,  
14 the 50 cent per-subscriber mechanical-only minimum  
15 kicks in regardless of whether there is streaming.

16 Q. So the \$1.06 in effect per-subscriber,  
17 per-user fee is not some world-shaking novel change?

18 A. I see it as similar to how that 50 cent  
19 number works today.

20 Q. Now, Mr. Steinthal also questioned you  
21 about unmatched rights, where they cannot match the  
22 composition to the owner. Do you recall that?

23 A. Yes.

24 Q. Now, isn't there a procedure -- and I may  
25 be testing you on something you don't know, so tell

1 me if you don't -- isn't there a procedure under  
2 Section 115 where the copyright owner is not  
3 identified or identifiable?

4 A. There is a procedure for a licensee to  
5 get a license when they cannot locate the copyright  
6 owner if they take certain steps, I believe.

7 Q. And I think the step includes filing an  
8 NOI with the Copyright Office, rather than it going  
9 to an identified copyright owner?

10 A. I believe that's correct.

11 Q. And that is how a service using an NOI  
12 properly can avoid liability; isn't that correct?

13 A. Yes, I understand several of the parties  
14 here today currently use that process.

15 Q. Turn to Exhibit 334, if you would, which  
16 I think was the --

17 A. The handouts?

18 Q. Yes. 334 was the HFA document that Mr.  
19 Steinthal put in and we agreed to it coming in.

20 A. I have it.

21 Q. Now, first of all, turn to the second  
22 page of that, if you would, and three paragraphs up  
23 from the bottom.

24 A. Okay.

25 Q. Do you see that? And it refers to Roger

1 Faxon, who was then the Chairman and CEO of EMI  
2 Music Publishing. They were a participant directly  
3 in the 2008 proceeding, were they not?

4 A. Yes, they participated both as a member  
5 of NMPA and also as an independently-filed party.

6 Q. And Mr. Faxon's statement, at least as he  
7 is quoted in this document, he says: "We're very  
8 pleased that these matters have finally been agreed,  
9 and that we have reached an agreement that is good  
10 for the songwriters we represent, and good for music  
11 consumers. This is a first step to establishing  
12 fair rates."

13 Do you recall Mr. Faxon's statement in  
14 that regard?

15 A. I don't recall his specific statement but  
16 I certainly recall his attitude as one of my larger  
17 Board members and how he felt about the settlement.

18 Q. And he felt, according to that, that it  
19 was a first step towards getting fair rates?

20 A. Yes. There were some members of my Board  
21 that believed that settling under these terms was  
22 not a rate they would have liked but that they  
23 agreed that, because it was such a small part of the  
24 industry, it was more important to establish a  
25 framework in case that these services grew and



1 became important economically.

2 Q. Okay. I am going to ask you to turn --  
3 and, again, this goes back to duplicate exhibits --  
4 but if you have the larger volume, or the smaller  
5 volume, but if you take the larger volume,  
6 Exhibit 319 is your rebuttal statement, whichever  
7 one is easier to access. In that book it is 3030, I  
8 think.

9 A. Okay.

10 Q. And Mr. Steinthal asked you a question,  
11 looking at paragraph 5 first, which is the portion  
12 that appears on page 3. And he referenced Michael  
13 King of RealNetworks being involved.

14 Do you see that?

15 A. Yes.

16 Q. Okay. And you recall dealing with  
17 Michael King in connection with the Phono I?

18 A. I don't recall a lot of interaction with  
19 Mr. King. I have come to know him better in later  
20 jobs that he had, but I guess I recalled him being  
21 involved in Phono I at the time I did this rebuttal  
22 paper.

23 Q. And Mr. Steinthal pointed out to you -- I  
24 don't know that you knew it or not -- but pointed  
25 out to you at least at some point in time Mr. King

1 reported to Ms. Levine. Do you recall that?

2 A. I recall his question. I don't know who,  
3 to whom he reported to.

4 Q. Well, if you turn to paragraph 14 of your  
5 rebuttal statement, and it states here: "I  
6 understand that Ms. Levine prior to her employment  
7 at YouTube was employed at listen.com, which was  
8 subsequently purchased by RealNetworks, which was a  
9 participant in Phonorecords I via trade organization  
10 DiMA. But Ms. Levine admittedly left RealNetworks  
11 for YouTube in 2006, two years prior to the  
12 Phonorecords I settlement."

13 Do you recall that statement?

14 A. I hadn't recalled it until now that I am  
15 seeing it, and it certainly explains my memory.

16 Q. And so if Mr. King reported to  
17 Ms. Levine, he wasn't reporting to her between 2006  
18 and 2008 because she was no longer there; isn't that  
19 right?

20 A. Yes.

21 MR. ZAKARIN: I have no further  
22 questions.

23 JUDGE BARNETT: Thank you, Mr. Zakarin.  
24 Anything further? Thank you, Mr. Israelite. You  
25 may be excused.

1 Do we have a 15-minute witness?

2 MS. BUCKLEY: We do.

3 THE WITNESS: Do I just leave all these  
4 exhibits here?

5 JUDGE BARNETT: Yes.

6 MS. BUCKLEY: I don't think it will  
7 finish in 15 minutes, but.

8 (Pause)

9 JUDGE BARNETT: Please raise your right  
10 hand.

11 Whereupon--

12 JUSTIN KALIFOWITZ,  
13 having been first duly sworn, was examined and  
14 testified as follows:

15 JUDGE BARNETT: Please be seated.

16 DIRECT EXAMINATION

17 BY MS. BUCKLEY:

18 Q. Good afternoon, Mr. Kalifowitz. Can you  
19 just introduce yourself to the Judges.

20 A. Hi. My name is Justin Kalifowitz. I'm  
21 the founder and CEO of Downtown Music Publishing.

22 Q. How long have you been working in the  
23 music industry?

24 A. Ever since I was a kid. It is the only  
25 career I have ever had.

1           Q.    Can you give us a brief background, how  
2   you became involved and how you went to found  
3   Downtown?

4           A.    Absolutely.  I started managing bands  
5   when I was a teenager and learned about the concept  
6   of interning and worked in every facet of the music  
7   business as an intern in high school, and out of  
8   high school got a job actually working in the  
9   recording music business at RCA Records, and then on  
10  to Virgin Records.

11                   And it was actually Virgin that I learned  
12  about music publishing where a mentor of mine said,  
13  you know you really should leave the record  
14  business, go work in the publishing business,  
15  because you are far too attached to the creative  
16  process and, you know, before you can record a song  
17  you have to write one.  And the publishers get to  
18  work at the base level of that process.

19                   And at first I really didn't know --  
20  sheet, I thought she meant sheet music publishing  
21  and I was confused why she was talking to me about  
22  this.

23                   And then as I learned more about it I  
24  ended up interviewing at a number of different  
25  publishing companies and ended up joining a company

1 called Spirit Music Group when I was 19.

2 And the guy who founded that company gave  
3 me a shot and taught me a lot about how to  
4 communicate with songwriters and the different  
5 process that they go through in their process from  
6 conceiving an idea to collaborating, to developing  
7 with them.

8 After about six and a half years the  
9 company grew and we were representing both  
10 established catalogues like Bob Marley Estates and  
11 Chaka Khan, Lou Reed's catalogue, to more emerging  
12 songwriters who hadn't ever really written a song  
13 anyone had ever heard and helping them get it all  
14 the way onto the pop charts.

15 And then when I was 25 I had the idea  
16 that I wanted to start my own publishing business,  
17 and paired up with some friends of mine who had  
18 started a recording music business and invested  
19 together and started Downtown Music Publishing in  
20 2007.

21 Q. Thank you. I am going to, in order to  
22 not make this restricted, at least in the first  
23 instance, I am going to ask you some questions about  
24 the growth of Downtown, but maybe we can use  
25 adjectives instead of the precise numbers.

1 A. Okay.

2 Q. Can we try that?

3 A. Sure.

4 Q. Okay. Can you give us a sense of the  
5 growth of Downtown over the years? Let's say first  
6 in terms of employees and, for instance, double,  
7 triple, whatever it may be.

8 A. Well, you know, we have, in the past five  
9 years, we have more than doubled the number of  
10 people working at the company. We will be ten years  
11 old in April.

12 Q. And what about in terms of clients who  
13 you represent?

14 A. So we have several hundred clients that  
15 we represent directly, both estates, families who  
16 own song copyrights, who wrote those songs, who are  
17 no longer active, but also active songwriters as  
18 well.

19 Q. In your witness statement at paragraph 5,  
20 if you need reference, it states that you read  
21 redacted public versions of the written direct  
22 statements of David Kokakis and Peter Brodsky and  
23 agree with their statements about the role of the  
24 music publisher, regarding the significant amount of  
25 time that publishers spend, and the costs they incur

1 to develop and support songwriters, help songwriters  
2 create great songs, promote those songs, and those  
3 writers, wide dissemination, and ensure that  
4 songwriters are fairly compensated for their  
5 creative work.

6 Does that remain true today?

7 A. Yes.

8 JUDGE BARNETT: Ms. Buckley, are you  
9 going to ask for the admission of that?

10 MS. BUCKLEY: Yes, I was just thinking  
11 that I had skipped that.

12 BY MS. BUCKLEY:

13 Q. Mr. Kalifowitz, take a look at what is  
14 3022 in that binder before you. And I am going to  
15 ask you whether you identify -- can identify that as  
16 your written direct testimony in this proceeding?

17 A. I can.

18 Q. And would you look at the last page and  
19 tell me whether that is your signature?

20 A. It is.

21 Q. Thank you.

22 MS. BUCKLEY: Your Honor, I would move  
23 into evidence CO-3022.

24 MR. ELKIN: Objection, based on the  
25 grounds set forth in the motion in limine before the

1 Court.

2 MR. MARKS: Same objection.

3 JUDGE BARNETT: Thank you, Mr. Elkin, Mr.  
4 Marks. 3022 is admitted then pending resolution of  
5 the preliminary motion.

6 (Copyright Owners Exhibit Number 3022 was  
7 marked and received into evidence.)

8 MS. BUCKLEY: Thank you, Your Honor.

9 BY MS. BUCKLEY:

10 Q. In the next paragraph, which would be 3,  
11 you proceed to discuss some of the differences that  
12 you believe independent publishers have, as opposed  
13 to major publishers like Universal and Sony/ATV,  
14 correct?

15 A. Yes.

16 Q. And can you tell us in the first instance  
17 what services Downtown performs for its songwriters?

18 A. You know, from the most basic on the  
19 administration side, royalty collection, licensing  
20 of their song copyrights to any users out there in  
21 the marketplace, creative services that begin with  
22 signing songwriters, developing them, educating them  
23 about the process, introducing them to songwriters  
24 who are operating at a higher level than them or  
25 have more experience than them, helping them find



1 their creative voice.

2                   Once they have delivered those  
3 compositions, through demonstration recordings that  
4 we finance the creation of, we also then go out into  
5 the marketplace and market and promote those song  
6 copyrights, sometimes to other artists to record,  
7 sometimes to film and television, to advertising  
8 agencies, and other folks in the media landscape who  
9 want to license their music.

10           Q.    Thank you. And do you employ creative  
11 personnel -- does Downtown employ creative  
12 personnel --

13           A.    Yes.

14           Q.    -- in particular?

15           A.    Yes.

16           Q.    And there, too, how -- can you give us a  
17 rough ratio of the creative employee to songwriter?

18           A.    Sure. It is about half our staff, I  
19 would say, and, you know, it is sort of almost like  
20 a 12-to-1 ratio between the number of folks who work  
21 on our creative team to the songwriters themselves,  
22 which, you know, when you consider the scale of our  
23 business and the number of employees we have, we  
24 talk about the differences between what majors and  
25 what independents do, this is one of the things that

1 we talk about at Downtown a lot, is that you get  
2 that close creative proximity, you know, managing a  
3 roster of 12 songwriters or any one creative  
4 individual at my team, is something that is quite  
5 manageable.

6           And they get, you know, significant time,  
7 significant face time, significant time in the  
8 studio to spend with them in developing that  
9 process.

10           Q.   Does Downtown perceive a benefit in  
11 having that sort of close personal touch with its  
12 songwriters?

13           A.   Absolutely. I mean, not only with  
14 respect to attracting new songwriters, and retaining  
15 the ones who have signed to us so that they don't  
16 consider signing elsewhere, but also the process of  
17 songwriting is not -- people don't roll out of bed  
18 and have a hit, you know, it is a labor of love.  
19 For some people it takes three, four, five, six  
20 years of writing and being mentored before they get  
21 to that place where they have any success that the  
22 general public would hear.

23           So we believe that our creative team not  
24 only expedites that process but helps them achieve  
25 their personal and professional goals of writing

1 songs that last the test of time.

2 Q. Does Downtown spend resources on, in the  
3 first place, discovering talent?

4 A. Yeah, absolutely.

5 Q. And how does Downtown discover talent?  
6 What is its process, if you will?

7 A. There are a variety of different ways  
8 depending on the type of songwriter or artist that  
9 we would be signing to a music publishing deal. One  
10 of the ways in which they come through us is through  
11 the talent scouts that we employ at the company  
12 rather than the marketplace looking for that next  
13 generation of songwriters.

14 And, you know, I think beyond just  
15 identifying who they are, is then often putting them  
16 through the paces, taking them, and taking a  
17 songwriter that we may have interest in signing and  
18 saying why don't you go work with one of our  
19 established writers and see how that goes.

20 And so it is not only the resources of  
21 our team, but actually taking away from the times of  
22 our established writers to sort of test that next,  
23 and the established writers love it because they  
24 love mentoring that next generation and being a part  
25 of it, but it is sort of a dual part process between

1    them.

2           Q.    And in your witness statement you talk  
3    about developing a songwriter.

4                    Can you give us sort of a definition of  
5    what it means to develop a songwriter?

6           A.    Yeah.  You know, from -- when you think  
7    about sort of the songwriter who is just getting  
8    going and someone on the team senses that there is  
9    some raw talent there, you know, they oftentimes  
10   don't know even the basics of going into a writing  
11   session, how is that going to look and feel like,  
12   figuring out what kind of style of music that that  
13   raw talent they have might be best fit for, finding  
14   the right production partner, because it is not only  
15   about who wrote a song but who can actually create  
16   the best demonstration of that song you wrote to  
17   help turn it into a new life.

18                   It is about things like songwriting  
19   temps, right, where we take people who have never  
20   really collaborated in anything, only had one  
21   collaborating in their whole life, and all of a  
22   sudden they are spending the week in a studio where  
23   they have to -- are forced to collaborate two or  
24   three different writers a day.

25                   And this really accelerates the creative

1 muscle, they call it, and pushes them through the  
2 paces of becoming, you know, great songwriters.

3               With writer-artists, people who are  
4 writing songs for themselves, it is a slightly  
5 different process. It is helping identify the type  
6 of art they want to create, who maybe the best  
7 producer is to work with them, depending on where  
8 they are in their career.

9               Sometimes it is about helping them find  
10 management, legal representation. Sometimes it is  
11 about helping them find the right booking agent and  
12 going out on the road.

13              There are a lot of times that publishers  
14 work with songwriters early on, and we will say: Go  
15 tour this song or go tour these five songs for three  
16 months, and then you will record them after, because  
17 this basic idea that you have now, after you play it  
18 90 times it is going to sound different. And all  
19 also part of the development process is us financing  
20 them to be able to do that.

21              Q. Does Downtown have five different offices  
22 in different cities and perhaps even outside the  
23 U.S.?

24              A. Yes.

25              Q. And where are those offices located?

1           A.    The major music centers, New York,  
2 Nashville, Los Angeles, London, Amsterdam. And we  
3 just opened earlier this year in Tokyo.

4           Q.    And what is the purpose of having five  
5 offices in different locations?

6           A.    So part of, you know, the attraction in  
7 this day and age for songwriters is to be able to  
8 have, you know, recognize that music makes a global  
9 impact on people. And I think one of the things  
10 that we look to do is really offer that full-bore  
11 creative service.

12                   We've centralized our licensing back  
13 office administration capability in New York, and  
14 our offices outside of New York are almost  
15 exclusively focused on the creative process.

16           Q.    Does Downtown pay songwriters advances?

17           A.    Yes.

18           Q.    And in the first instance, what is the  
19 purpose of paying songwriters advances?

20           A.    So they can be songwriters, because if we  
21 didn't pay them advances and they had to wait around  
22 they would also have to have a job. And if you are  
23 working 9:00 to 5:00 you can't go to that session,  
24 and someone canceled at the last minute and there is  
25 an opening for you to slot into, which happens quite

1 often, and especially for emerging songwriters  
2 looking for their shot.

3 And so it really gives them the  
4 opportunity to focus full-time on their craft and on  
5 their profession and, you know, it has been the  
6 structure of the industry for quite some time.

7 Q. Does Downtown have any songwriters that  
8 are poster children, if you will, for the purpose of  
9 paying advances to songwriters?

10 A. Absolutely. I can give an example, if  
11 that's okay.

12 Q. Yes.

13 A. There is a songwriter named Andy Albert  
14 that we work with, that I mentioned here, who is  
15 someone that was, you know, real --

16 JUDGE BARNETT: This is, excuse me, this  
17 is grayed out in the --

18 MS. BUCKLEY: Okay. I am just checking  
19 about whether or not it is restricted.

20 For this, we would have to clear the  
21 courtroom. So I can ask a couple of other questions  
22 in the meantime.

23 JUDGE BARNETT: Thank you.

24 BY MS. BUCKLEY:

25 Q. Does Downtown provide any financial

1 support for its songwriters that is different from  
2 paying an advance?

3 A. Oh, absolutely. So, you know, I think  
4 one of the things that people forget with  
5 songwriters is that, again, it is, you know, you  
6 can't touch the song, right, so you have to create  
7 it in a physical form for people to hear it, and  
8 that's a sound recording.

9 And so demonstration recordings are a  
10 significant part of what we do. Sometimes those are  
11 treated as additional advances to songwriters.  
12 Other times it is out-of-pocket. It depends on the  
13 deal that we cut with the songwriter.

14 But Downtown also has studios in its  
15 offices in New York, over 3,000 square feet of our  
16 space in Soho dedicated to recording studios. We  
17 have six writing rooms in Nashville. We have a  
18 writing room in Los Angeles. That doesn't get sort  
19 of factored in. We just cover that overhead.

20 And we allow our songwriters to come to  
21 work there, providing them, you know, engineers that  
22 are on staff for us as well to work with them  
23 through that process.

24 And apart from advances, some deals come  
25 with tour support that are just considered



1 additional fees. Some deals start early on, like we  
2 know they are looking to build a home studio setup  
3 to create recordings, at least initially, in a  
4 facility, and so some of the deals in addition to an  
5 advance will include just a flat payment to cover  
6 some of those costs upfront that aren't factored in  
7 as advances.

8 Q. Are some of the expenses or additional  
9 financial support things that record labels used to  
10 do?

11 A. Absolutely.

12 Q. And that would include, for instance, the  
13 demos?

14 A. Yeah, I think that, you know,  
15 historically, certainly in the recent past up until  
16 the mid-2000s, my guess, not my recollection of  
17 this, is that, you know, publishers would sign deals  
18 with songwriters and certain songwriters get certain  
19 creative services.

20 But when it came to writer-artists, what  
21 you had was a situation where the record companies  
22 would cover the full bore of the recording cost.

23 And now, you know, what we're seeing over  
24 and over and over again is songwriters that we sign  
25 as artists who utilize the publishing advance almost

1 exclusively to cover all of their costs.

2                   And then they will use independent  
3 distributors or there will be a Tunecore or a CD  
4 Baby to put their music out into the world without  
5 any additional financial support from a record  
6 company. They are their own record company.

7                   Some of them are quite successful. They  
8 end up working with distributors that are sort of in  
9 the mid-tier level that offer some services but,  
10 again, no cash.

11                  And so the publishing advance is really,  
12 you know, what takes them through in quite a bit of  
13 instances. There are numerous songwriters on our  
14 roster who, particularly these writer-artists, who  
15 go down that path.

16                Q. Does Downtown track the exploitation of  
17 the songs of its songwriters and collect and process  
18 income owing to songwriters?

19                A. Yes.

20                Q. And how does it do that?

21                A. So the other half of our staff is split  
22 up between administration, royalty collection. We  
23 also have a technology department. We invested  
24 significantly in the development of our own internal  
25 global royalty collection platform called Songtrust

1 which, you know, is a significant overhead  
2 expenditure of the company.

3 But part of it is, you know, the role of  
4 the publisher is, you know, we've talked a lot about  
5 creative so far, but a lot of it is, you know,  
6 accurately collecting all their royalties, quickly  
7 responding to all inbound license requests,  
8 following up on payment, which oftentimes doesn't  
9 come as quickly as we had hoped, and, you know,  
10 really tracking that whole process.

11 You know, recouping the advances happens  
12 largely as a function of the creative process as  
13 much as being an efficient royalty collection agent.

14 Q. Does Downtown recoup advances from  
15 performance income to songwriters?

16 A. Yes, from the publisher share.

17 Q. The publisher's share?

18 A. Correct.

19 Q. Not the songwriter's share?

20 A. No.

21 Q. Has Downtown changed its business  
22 strategies or practices in any way in response to  
23 the mechanical rates for interactive streaming?

24 A. So one of the things that we have done is  
25 over the past, I would say, three years looked at

1 developing songwriters as a smaller portion of our  
2 business. Nothing has changed with respect to the  
3 process, but, you know, quite a bit of our focus has  
4 gone to songwriters with established income streams,  
5 whether it be performance or there is a historical  
6 subset of songs in their catalogue we believe could  
7 generate significant licensing income from  
8 synchronization or things of that nature.

9               So less of a focus on development and  
10 more of a focus on folks who have established song  
11 copyrights. Part of the reason for that is that,  
12 you know, we call up a songwriter today and tell  
13 them they got a cut and they're like, okay.

14              We call up a songwriter and we tell them  
15 they have a huge synch license, and they are like,  
16 oh, that's cool, you know. And part of that reason  
17 is that, you know, what their expectation is, is  
18 that when they get an album cut these days and, you  
19 know, lots of people listen to it, they know there  
20 is not much at the end of the pipe there for them,  
21 you know.

22              And so that's definitely things that have  
23 changed. Just going back when I was at Spirit Music  
24 early in my day, no one knew who I was as a  
25 publisher. I would go after songwriters who are

1 developing, may have gotten an album cut, if there  
2 was enough income from that album cut to justify  
3 giving them a significant advance and moving  
4 forward. You get that same equivalent today, there  
5 is not enough income to do that.

6 MS. BUCKLEY: I think I would need to  
7 start moving into restricted material.

8 JUDGE BARNETT: Let's recess for the day.  
9 We will come back at 9:00 o'clock in the morning and  
10 take care of the restricted.

11 MS. BUCKLEY: Thank you, Your Honor.

12 JUDGE BARNETT: Thank you. After Mr.  
13 Kalifowitz is completed, what next?

14 MR. ZAKARIN: Dr. Gans.

15 JUDGE STRICKLER: Then Dr. Rysman?

16 MR. ZAKARIN: Yes, I think that's exactly  
17 right.

18 JUDGE STRICKLER: That should be the  
19 better part of the day.

20 JUDGE BARNETT: And then some.

21 MR. ZAKARIN: That sounds exactly right.

22 JUDGE BARNETT: Thank you.

23 MR. ZAKARIN: Nothing has been according  
24 to schedule yet.

25 (Whereupon, at 5:08 p.m., the hearing

1 recessed, to reconvene at 9:00 a.m. on Thursday,  
2 March 30, 2017.)

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|----|---|--------------------|-------|----------|---------|
| 1  | C O N T E N T S                             |                    |       |          |         |
| 2  | WITNESS                                     | DIRECT             | CROSS | REDIRECT | RECROSS |
| 3  | DAVID ISRAELITE                             |                    |       |          |         |
| 4  |   | 3616               | 3678  |          |         |
| 5  |   |                    | 3770  |          |         |
| 6  |   |                    | 3865  | 3871     |         |
| 7  | JUSTIN KALIFOWITZ                           |                    |       |          |         |
| 8  |   | 3887               |       |          |         |
| 9  |   |                    |       |          |         |
| 10 | AFTERNOON SESSION: 3737                     |                    |       |          |         |
| 11 |   |                    |       |          |         |
| 12 | CONFIDENTIAL SESSIONS: 3723-3736, 3739-3751 |                    |       |          |         |
| 13 |   |                    |       |          |         |
| 14 | E X H I B I T S                             |                    |       |          |         |
| 15 | EXHIBIT NO:                                 | MARKED/RECEIVED    |       | REJECTED |         |
| 16 | AMAZON                                      |                    |       |          |         |
| 17 | 309   |                    | 3725  |          |         |
| 18 | 327   |                    | 3668  |          |         |
| 19 | 331   |                    | 3682  |          |         |
| 20 | 332   |                    | 3704  |          |         |
| 21 | 333   |                    | 3688  |          |         |
| 22 | 334   |                    | 3850  |          |         |
| 23 | 337   |                    | 3760  |          |         |
| 24 | GOOGLE                                      | MARKED FOR ID ONLY |       |          |         |
| 25 | 6015  |                    | 3793  |          |         |

|    |                  |                    |          |
|----|------------------|--------------------|----------|
| 1  | EXHIBIT NO:      | MARKED FOR ID ONLY |          |
| 2  | GOOGLE           |                    |          |
| 3  | 6017             | 3816               |          |
| 4  | 6018             | 3826               |          |
| 5  | 6019             | 3830               |          |
| 6  | 6020             | 3834               |          |
| 7  | 6021             | 3840               |          |
| 8  | GOOGLE           | MARKED/RECEIVED    | REJECTED |
| 9  | 6013             | 3774               |          |
| 10 | 6014             | 3774               |          |
| 11 | 6016             | 3807               |          |
| 12 | COPYRIGHT OWNERS | MARKED FOR ID ONLY |          |
| 13 | 6012             | 3716               |          |
| 14 | COPYRIGHT OWNERS | MARKED/RECEIVED    | REJECTED |
| 15 | 3022             | 3892               |          |
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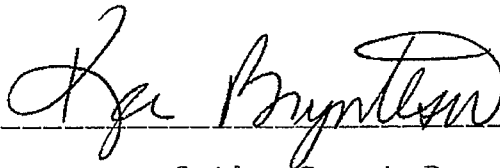


## CERTIFICATE

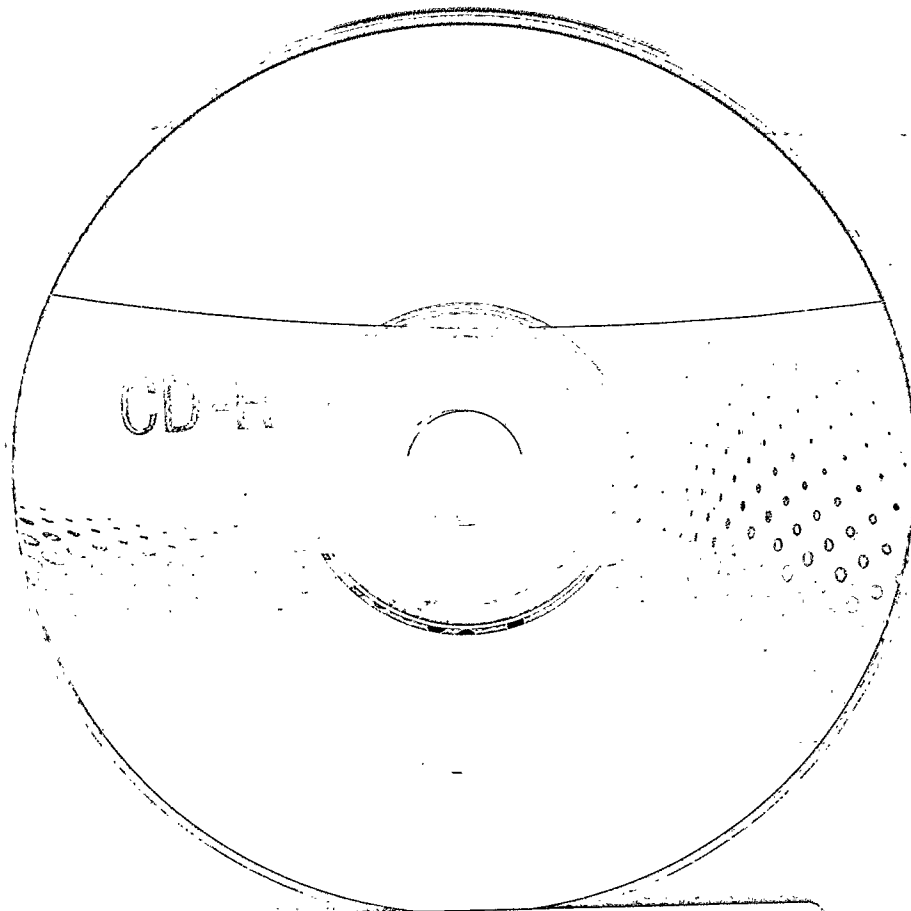
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I certify that the foregoing is a true and  
accurate transcript, to the best of my skill and  
ability, from my stenographic notes of this  
proceeding.

3/30/17



Signature of the Court Reporter



Heritage Reporting Corp.  
1220 L Street, NW; Ste 206  
Wash DC 20005  
Client: LOC Date: 3/29/17  
Case: Rates and Terms (Phonorecords III)  
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